Petition

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THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

IN RE: GRAND JURY INVESTIGATION
OF CUISINARTS, INC.

STATES OF CONNECTICUT, RHODE ISLAND AND PROVIDENCE PLANTATIONS, VERMONT, NEW YORK, COLORADO, NEW JERSEY, NORTH CAROLINA, MAINE, NEW HAMPSHIRE, MARYLAND, TEXAS, WISCONSIN, AND COMMONWEALTHS OF MASSACHUSETTS AND VIRGINIA,

Petitioners,

v.

CUISINARTS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether, and Under What Circumstances, Section 4F(b) Of The Hart-Scott-Rodino Antitrust Improvements Act Permits A State Attorney General Access To Federal Grand Jury Materials

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IN RE: GRAND JURY INVESTIGATION
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STATES OF CONNECTICUT, RHODE ISLAND AND PROVIDENCE PLANTATIONS, VERMONT, NEW YORK, COLORADO, NEW JERSEY, NORTH CAROLINA, MAINE, NEW HAMPSHIRE, MARYLAND, TEXAS, WISCONSIN AND COMMONWEALTHS OF MASSACHUSETTS AND VIRGINIA,

Petitioners,

v.

CUISINARTS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, the States of Connecticut, Rhode Island and Providence Plantations, Vermont, New York, Colorado, New Jersey, North Carolina, Maine, New Hamp-

shire, Maryland, Texas and Wisconsin, and the Commonwealths of Massachusetts and Virginia respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in this proceeding on November 19, 1981. The United States, which was an Intervenor, has not joined in this petition.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported in 1981-2 Trade Cas. (CCH) ¶64,377 and appears as Appendix A hereto. The decision of the District Court for the District of Connecticut is reported in 1981-1 Trade Cas. (CCH) ¶64,080 and appears as Appendix D hereto.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on November 19, 1981 and appears as Appendix B hereto. The mandate of the Court of Appeals was stayed by order of December 17, 1981, appearing as Appendix C hereto. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

STATUTE AND RULE INVOLVED

Hart-Scott-Rodino Antitrust Improvements Act of 1976, Title III, §4F (15 U.S.C. §15f):

> (a) Whenever the Attorney General of the United States has brought an action under the antitrust laws, and he has reason to believe that any

State attorney general would be entitled to bring an action under this Act based substantially on the same alleged violation of the antitrust laws, he shall promptly give written notification thereof to such State attorney general.

(b) To assist a State attorney general in evaluating the notice or in bringing any action under this Act, the Attorney General of the United States shall, upon request by such State attorney general, make available to him, to the extent permitted by law, any investigative files or other materials which are or may be relevant or material to the

actual or potential cause of action under this Act.

Rule 6(e) (3)(C)(i), Federal Rules of Criminal Procedure, provides in pertinent part:

> Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made:
>
> (i) when so directed by a court preliminarily to or in connection with a judicial proceeding . . .
>
> If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

STATEMENT OF THE CASE

The Attorneys General of fourteen states (hereinafter "the States") are seeking to obtain documents produced to, and testimony before, a federal grand jury which returned an indictment charging Cuisinarts, Inc. (hereinafter "Cuisinarts") with price fixing, a per se violation of Section 1 of the Sherman Act (15 U.S.C. §1). The request for these materials, addressed to the District Court for the District of Connecticut (hereinafter the "District Court"), was made by motion pursuant to Rule 6(e), Fed. R. Crim. P., and Section 4F(b) of Title III of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 [15 U.S.C. §15 f(b)] [hereinafter "Section 4F(b)"].

In 1979, the United States Department of Justice began an investigation of the marketing practices of Cuisinarts. In connection therewith, Justice issued a number of Civil Investigative Demands pursuant to 15 U.S.C. §1312 for the production of documents and the giving of oral testimony.

On June 3, 1980, a special grand jury was empaneled in the District of Connecticut in connection with the investigation of Cuisinarts. The grand jury received some of the documents and testimony given in response to the Civil Investigative Demands. Additionally, the grand jury subpoenaed documents from a number of companies and individuals and heard testimony from twenty-three witnesses. All employees of Cuisinarts, who testified before the grand jury,

were specially advised that their testimony might become public. On September 17, 1980, the grand jury returned an indictment against Cuisinarts, the only target of the investigation (United States v. Cuisinarts, Inc., Crim. No. H-80-49). On that same day, the Department of Justice filed a civil complaint seeking equitable relief against Cuisinarts under Section 16 of the Clayton Act (15 U.S.C. §26).

Pursuant to Section 4F(a) of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, the Department of Justice then notified the States of the indictment of Cuisinarts for alleged violations of the Sherman Act. Upon receiving said notice, the States[1/] formally requested

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1/ Originally, fifteen states sought the materials including the fourteen petitioners herein plus Pennsylvania.

the Department of Justice to grant access to all investigative materials relating to the criminal action against Cusinarts pursuant to Section 4F(b). In response, the Department of Justice provided the States with copies of the indictment and civil complaint already part of the public record, as well as copies of internal memoranda totalling only seventeen (17) pages from the Department of Justice's files. It also advised the States that materials used or generated by the grand jury could not be made available absent a court order pursuant to Rule 6(e), Fed. R. Crim. P. Disposition was reached in the federal criminal case on December 19, 1980, by entry of a plea of nolo contendere, and the levying of a $250,000 fine. Also, on that date,

the Department of Justice and Cuisinarts stipulated to the submission of a proposed final judgment in the civil action. On March 26, 1981, the District Court adopted the proposed terms of the final judgment and entered said judgment on March 27, 1981, thereby concluding the civil action.

After entry of the plea by Cuisinarts, the States filed a motion with the District Court, pursuant to Rule 6(e), Fed. R. Crim. P. and Section 4F(b), for an order granting access to all grand jury materials, including transcripts of the testimony of grand jury witnesses and documents and exhibits gathered or generated pursuant to the federal grand jury's investigation. The District Court's denial of the motion constituted a final judgment and precipitated filing

of the appeal below by the States. Jurisdiction of the Court of Appeals was invoked under 28 U.S.C. §1291.

On November 19, 1981, the United States Court of Appeals for the Second Circuit (hereinafter "the Court of Appeals") affirmed the District Court's decision. Judge Kaufman, writing for the court, held that the statutory language "investigative files or other materials" as used within Section 4F(b) did not "embrace grand jury materials." (Appendix A at 26). Additionally, the Court of Appeals went on to conclude that the term "to the extent permitted by law" as found in Section 4F(b) did not relieve state Attorneys General from demonstrating particularized need in seeking access to grand jury materials. (Appendix A at 43).

In reaching this holding, the Court of Appeals accepted the analysis of the Seventh Circuit in In re State of Illinois Petition to Inspect and Copy Grand Jury Materials, 659 F.2d 800 (7th Cir. 1981), petition for cert. filed sub nom. Illinois v. Abbott & Associates, Inc., 50 U.S.L.W. 3516 (U.S. Dec. 15, 1981) (No. 81-1114), which similarly denied a state Attorney General access to grand jury materials without a showing of compelling and particularized need. The Second Circuit specifically declined to follow the contrary decisions of the Fourth and Ninth Circuits in United States v. Colonial Chevrolet Corp., 629 F.2d 943 (4th Cir. 1980), cert. denied, 450 U.S. 913 (1981), and United States v. B. F. Goodrich Co., 619 F. 2d 798 (9th Cir. 1980).

REASONS FOR GRANTING OF THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS BELOW IS IN DIRECT AND TOTAL CONFLICT WITH THE FOURTH AND NINTH CIRCUITS' DECISIONS THAT SECTION 4F(b) AUTHORIZES DISCLOSURE OF FEDERAL GRAND JURY MATERIALS TO STATE ATTORNEYS GENERAL WITHOUT A SHOWING OF PARTICULARIZED NEED

Section 4F(b), of Title III of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 [15 U.S.C. §15f(b)], mandates that "investigative files or other materials" generated by the Attorney General of the United States in federal antitrust investigations shall be made available, "to the extent permitted by law", to state Attorneys General. The issue presented is whether the States must show particularized need to obtain access to the federal grand jury materials under Section 4F(b). The

Court of Appeals below and the Seventh Circuit have answered this question in the affirmative. The Courts of Appeals for the Fourth and Ninth Circuits have answered in the negative.

In United States v. Colonial Chevrolet Corp., 629 F.2d 943 (4th Cir. 1980), cert. denied, 450 U.S. 913 (1981), and United States v. B. F. Goodrich Co., 619 F.2d 798 (9th Cir. 1980), the Fourth and Ninth Circuits held that a state Attorney General was entitled to access to grand jury materials under Section 4F(b) without a special showing of particularized need. Those courts determined that grand jury materials were contained within the meaning of the phrase "investigative files or other materials" and that the states, while not having demonstrated

particularized need, had satisfied the lesser standard for disclosure of such materials to state Attorneys General under Rule 6(e), Fed. R. Crim. P., when read in conjunction with Section 4F(b).[2/]

The opinion of the Court of Appeals below, however, rejected these decisions (Appendix A at 13) and concluded that Section 4F(b) does not permit the States

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2/ This same conclusion has been reached by district courts in other circuits. See In re Grand Jury Investigation of Armored Car Industry, 1981-2 Trade Cas. (CCH) ¶64,182 at 73,630 (N.D.Ga. 1981), stipulation to dismiss appeal filed, No. 81-7665 (11th Cir. 10/9/81); In re Grand Jury Proceedings, Mis. No. 1331 (N.D. Tex. 1/21/81), appeal pending, No. 81-1059 (5th Cir. 1981); United States v. Cargo Gasoline Co., No. 79-124-Cr-J-B (M.D.Fla. 12/8/80, 12/24/80, 1/29/81, 2/11/81), appeal dismissed sub nom. United States v. Star Service & Petroleum Co., No. 81-5128 (5th Cir. 1981); United States v. Campbell Hardware, Inc., 1979-2 Trade Cas. (CCH) ¶62,794 at 78,615 (D.Mass. 1979).

to obtain access to federal grand jury materials without a showing of particularized need. The Second Circuit's interpretation of Section 4F(b) followed the Seventh Circuit in In re State of Illinois Petition to Inspect and Copy Grand Jury Materials, 659 F.2d 800 (7th Cir. 1981) petition for cert. filed sub nom. Illinois v. Abbott & Associates, Inc., 50 U.S.L.W. 3516 (U.S. Dec. 15, 1981) (No. 81-1114); accord Little Rock School District v. Borden, Inc., 1979-2 Trade Cas. (CCH) ¶62,809 at 78,715 (E.D.Ark. 1979); Matter of Grand Jury, 469 F.Supp. 666 (M.D.Pa. 1978).

The split between and among the courts of appeals on this issue is irreconcilable. Since Section 4F(b) and its legislative history have been interpreted in a totally divergent fashion by

different courts of appeals, review by this Court is appropriate for this reason alone. Furthermore, the issue presented is a recurring one and of great importance to effective nationwide antitrust enforcement. States access to federal grand jury materials ought not depend on where particular antitrust cases are brought.

II.

BY IGNORING THE INTENT OF CONGRESS TO PLACE A SIGNIFICANT DEGREE OF RESPONSIBILITY FOR ENFORCEMENT OF THE ANTITRUST LAWS UPON THE STATES, THE COURT OF APPEALS HAS INCORRECTLY DECIDED AN IMPORTANT QUESTION OF LAW ENFORCEMENT POLICY

Congress enacted the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub.L. 94-435, 90 Stat. 1383, to invigorate antitrust enforcement by states. The decisions of the courts

below, however, seriously undermine this purpose by trivializing an essential component of Hart-Scott-Rodino.

Contrary to the conclusion reached below, 1981-2 Trade Cas. (CCH) ¶64,377 at 74,740, and by the Seventh Circuit in Illinois Petition, 659 F.2d at 806-07, Hart-Scott-Rodino was not directed solely to problems of class certification and proof of damages. The Act was intended to be a comprehensive solution to perceived inadequacies in existing antitrust enforcement on the state and federal level.[3/]

Of particular importance to the framers of Hart-Scott-Rodino was the

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3/ Title I of Hart-Scott-Rodino expanded the federal Antitrust Division's civil investigative powers. 15 U.S.C. §§1311-1314. Title II strengthened the Division's merger enforcement capabilities. 15 U.S.C. §18a.

expansion of the role to be played by states, through their attorneys general, in enforcing the antitrust laws. See H. R. Rep. No. 94-499, 94th Cong., 2d Sess. 5 (1975), reprinted in 1976 U.S. Code Cong. & Ad. News 2572, 2575 [hereinafter "House Report"] (A State Attorney General is "an effective and ideal spokesman for the public in antitrust cases . . ."). To this end, Title III of the Act conferred upon the states several procedural benefits denied to non-governmental antitrust plaintiffs. Among these innovations were: (1) granting states the right to institute parens patriae suits on behalf of their citizens (15 U.S.C. §15c); (2) exempting parens suits from the class action requirements of Rule 23, Fed. R. Civ. P. [15 U.S.C. §15c(a)]; (3) permitting

damages in parens suits to be computed and distributed through aggregation techniques (15 U.S.C. §§15c-15d); and (4) directing federal antitrust enforcers to cooperate fully with state antitrust agencies by providing them with notice of possible causes of action [15 U.S.C. §15f(a)] and the factual information, namely their "investigative files or other materials," necessary to effective antitrust enforcement by states [15 U.S.C. §15f(b)].4/

The legislative history clearly indicates that increased cooperation and

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4/ The information-sharing provisions of §4F apply to proprietary suits brought by a state under §4 of the Clayton Act, 15 U.S.C. §15, as well as parens patriae suits under §4C, 15 U.S.C. §15c. See United States v. Colonial Chevrolet Corp., 629 F.2d at 948 n.11; In re Grand Jury Investigation of Armored Car Industry, 1981-2 Trade Cas. (CCH) ¶64,182 at 73,631.

sharing of information between federal and state antitrust agencies, as required by Sections 4F(a) and (b), was a fundamental objective of that legislation. See e.g., House Report at 17; Antitrust Parens Patriae Amendments: Hearings Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary on H.R. 12528 and H.R. 12921, 93d Cong., 2d Sess. 13-17 (1974) (hereinafter "House Hearings") (Opening Statement of Chairman Rodino). As explained by Representative Rodino, increased "coordination, communication, and cooperation among federal and State antitrust enforcers . . ." was necessary to make the other procedural innovations of the Act effective. Id. at 13.

Congress enacted Section 4F(b) so that states could receive the fruits of Department of Justice antitrust investigations and thereby avoid the substantial waste of tax dollars resulting from duplicative investigation of antitrust violations. In passing that Section, Congress was aware of the superior investigative resources of the federal government and limited resources of the states. It also knew that price fixing and bid-rigging, the hard core, per se violations, are investigated by the Department of Justice almost exclusively by use of the grand jury and constitute those violations which most adversely impact upon the economy. See House Hearings at 23, 38, 43 (Testimony of Thomas E. Kauper, Asst. Atty. Gen.); Antitrust Civil Process Act Amendment:

Hearings on H.R. 39 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary, 94th Cong., 1st Sess. 36 (1975). Congress therefore used the terms "investigative files" and "other materials", terms as broad as can be conceived of, to insure that states would receive all significant information obtained by the Department of Justice, including grand jury materials. "It is unlikely in the extreme Congress intended to exclude such material from the statutory definition of investigative files". United States v. Colonial Chevrolet Corp., 529 F.2d at 947.

The courts below, however, failed to recognize the overall importance of Hart-Scott-Rodino, and thereby improperly concluded that Section 4F(b) was not

intended to create a special niche for grand jury documents vis-a-vis antitrust enforcement by states. That conclusion effectively nullifies Section 4F(b), depriving states of access to those materials clearly most important to effective antitrust enforcement.

Furthermore, it is well-settled that the question of disclosure is one firmly committed to the discretion of the courts, United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 233-34 (1940); Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 223 (1979), in accord with congressional directives that disclosure is appropriate in particular situations. The courts have traditionally balanced the competing policy justifications for continued secrecy versus the need for full

disclosure of all relevant evidence. Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 219-223 (1979).

As recognized by the numerous courts which have approved disclosure of grand jury materials pursuant to Section 4F(b), the "to the extent permitted by law" language within the statute simply requires court approval of disclosure pursuant to Rule 6(e), Fed. R. Crim. P. Where, as here, the petitioners are States, proceeding under Section 4F(b), Congress "has resolved the public interests consideration in such a case and, in so doing, it [has] accordingly relieved that official of the requirement of establishing a 'particularized need' as a threshold to disclosure." United States v. Colonial Chevrolet Corp., 629 F.2d at 950. Congress placed states "on

a different footing than private parties seeking redress for antitrust violations." United States v. B. F. Goodrich Co., 619 F.2d at 800-801.

However, in exercising their discretion, courts are neither to compromise ongoing federal antitrust enforcement nor unnecessarily infringe upon the broader goals of grand jury secrecy. See e.g., United States v. B. F. Goodrich Co., 619 F.2d at 800-801; In re Montgomery County Real Estate Antitrust Litigation, 452 F.Supp. at 62. Disclosure to states after termination of federal investigations or prosecutions, together with court imposed safeguards which afford witnesses adequate protection when necessary, insure that congressional intent to promote state enforcement of the

antitrust laws is achieved without compromising the goals of grand jury secrecy.

By ignoring the congressional determination that the several states are to be afforded special status in antitrust enforcement, the Court of Appeals precluded itself from striking a proper balance of interests as mandated by this Court in Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979). Clearly, Congress' determination of the law enforcement role of states is entitled to greater weight than afforded it by the court below.

The instant case illustrates well the utter uselessness of Section 4F(b) as interpreted by the court below. The conspiracy at issue here spanned many years and adversely affected the public

nationwide. Thousands of pages of documents and twenty-three witnesses are believed to have been examined during the investigation. Despite the massive size of the federal government's investigations, the States have received but seventeen (17) pages of preliminary staff memoranda authored long before the investigation reached its fruition in the District Court. Surely this cannot be the result intended by Congress.

The right of states to obtain grand jury materials upon a showing of particularized need had already been established in cases decided before the enactment of Section 4F(b). See e.g., In re Cement-Concrete Block-Chicago Area, 381 F.Supp. 1108 (N.D.Ill. 1974); Illinois v. Harper & Row Publishers, Inc., 50 F.R.D. 37 (N.D.Ill. 1969); cf.

United States v. Sobotka, 623 F.2d 764 (2d Cir. 1980). In establishing the particularized need standard in United States v. Proctor & Gamble Co., 356 U.S. 677 (1958) and Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979), this Court considered the issue of disclosure of grand jury materials only in the context of private party requests. Those cases did not involve requests by state Attorneys General after enactment of Section 4F(b). If states must still demonstrate particularized need under Rule 6(e), notwithstanding enactment of Section 4F(b), Congress has passed a statute that was redundant and totally unnecessary. Such an absurd and fruitless construction should be rejected by this Court.

In view of the nationwide impact of

this question, Supreme Court review of this case is essential to effective antitrust enforcement by states.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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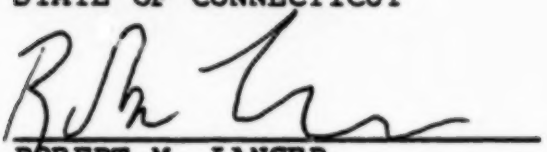

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APPENDIX A

UNITED STATES COURT OF APPEALS
For the Second Circuit

No. 180 August Term, 1981
(Argued November 2, 1981
Decided November 19, 1981)
Docket No. 81-7338

IN RE: GRAND JURY INVESTIGATION OF CUISINARTS, INC.,

STATE OF CONNECTICUT, COMMONWEALTH OF MASSACHUSETTS, STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, STATE OF VERMONT, STATE OF NEW YORK, STATE OF COLORADO, STATE OF NEW JERSEY, STATE OF NORTH CAROLINA, STATE OF MAINE, STATE OF NEW HAMPSHIRE, STATE OF MARYLAND, COMMONWEALTH OF VIRGINIA, STATE OF TEXAS, STATE OF WISCONSIN,

Appellants,

UNITED STATES OF AMERICA,

Intervenor,

v.

CUISINARTS, INC.,

Appellee.

---x

Before: KAUFMAN and MESKILL,
Circuit Judges,
and BONSAL, District Judge.*

Appeal from an order of the United States District Court of Connecticut, Jose A. Cabranes, Judge, denying appellants' motion for disclosure of grand jury materials pursuant to Section 4F(b) of the Clayton Act, 15 U.S.C. §15f(b), and Fed. R. Crim. P. 6(e).

Affirmed.

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* Of the United States District Court for the Southern District of New York, sitting by designation.

Robert M. Langer, Assistant Attorney General, State of Connecticut, Hartford, Connecticut (Carl R. Ajello, Attorney General, Steven M. Rutstein, Assistant Attorney General, State of Connecticut, of Counsel), for Appellant State of Connecticut.

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Judith W. Rogers, Corporation Counsel, Charles L. Reischel, Deputy Corporation Counsel, Timothy J. Shearer, Assistant Corporation Counsel, District of Columbia, of Counsel, for Amicus Curiae, District of Columbia.

KAUFMAN, Circuit Judge:

The long shadows of history enshroud the precise moment when the first grand jury was established in an English-speaking community. It appears, however, that a rudimentary ancestor of our modern grand jury was an integral element of the system of justice in medieval England over eight hundred years ago. Our forefathers carried this tradition to America and embedded its inherent powers in the Fifth Amendment of our Constitution. As this institution evolved over the centuries, its proceedings were cloaked with secrecy to guard against injury to reputations of the innocent, to protect witnesses from retaliation or intimidation, and to promote the grand jury's effectiveness as an investigative device.

This time-honored policy of secrecy has been the most essential, indeed indispensable, characteristic of grand jury proceedings.

Today, we are asked to lift this veil of secrecy. The States of Connecticut, Rhode Island, Vermont, New York, Colorado, New Jersey, North Carolina, Maine, New Hampshire, Maryland, Texas, and Wisconsin, and the Commonwealths of Massachusetts and Virginia ("States") would have us determine whether section 4F(b) of Title III of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. §15f (b),[1] permits the disclosure of grand jury materials to a state attorney general without the traditional showing of compelling and particularized need.[2] The Fourth[3] and the Ninth Circuits[4] have earlier ruled that

such a showing is not required. We disagree with their holding, as has the Seventh Circuit.[5] Judge Cabranes properly concluded that establishing particularized need is a requisite of gaining access to grand jury materials pursuant to Sections 4F(b) and Rule 6(e)(3)(C)(i) of the Federal Rules of Criminal Procedure.[6] Because the States failed to meet this standard, the district court refused to order disclosure to the States. We affirm.

I.

The journey along the path leading to this appeal began several years ago. In 1979, the Antitrust Division of the United States Department of Justice commenced an investigation of the marketing practices of Cuisinarts, Inc., a corporation that distributes electric

appliances known as food processors throughout the United States. In June 1980, a special grand jury was empanelled in the District of Connecticut as a result of this investigation. After hearing testimony from twenty-three witnesses and having over 50,000 documents submitted to it, the grand jury returned an indictment charging Cuisinarts with having conspired to fix, stabilize, and maintain retail prices of its food processors. The indictment alleged that such resale price maintenance amounted to a combination and conspiracy in unreasonable restraint of interstate trade, and therefore constituted a felony in violation of section 1 of the Sherman Act, as amended, 15 U.S.C. §1. On the same day, the United States filed a companion civil complaint based

upon the same factual allegations as the grand jury's indictment, seeking injunctive relief.

Both actions were substantially resolved in December 1980. Cuisinarts entered, and the court accepted, a plea of nolo contendere on the criminal charge. The court imposed a fine of $250,000. In the civil action, the United States and Cuisinarts stipulated to the submission of a proposed final judgment. In accordance with the terms of the proposed judgment, which the court adopted, Cuisinarts was enjoined from, inter alia, fixing the prices at which its food processors could be sold. This action was concluded in March 1981.

This litigation by the federal government, we note, involved the first federal criminal prosecution for vertical price fixing in many years - - at least since the penalty for violating the Sherman Act was increased to a felony in 1974. Accordingly, it provided the impetus for institution of a large and proliferating number of suits by state governments and private consumers. Shortly after the return of the federal indictment, private antitrust actions against Cuisinarts and its retailers commenced to flood the federal courts. To ease the burden this litigation imposed both on parties and on our judicial system, in January 1981, the Judicial Panel on Multidistrict Litigation ordered, pursuant to 28 U.S.C. §1407, that eight such actions were to

be consolidated for pre-trial proceedings in the District of Connecticut. By March, in accordance with the Panel's orders, four additional cases against Cuisinarts were transferred and consolidated with those already before the court, including a parens patriae action brought by the Commonwealth of Massachusetts. In the same month, a parens patriae suit instituted by the State of New Jersey was transferred to the District of Connecticut. As a result, thirteen civil actions were before the court for consolidated pre-trial proceedings. Of these, seven included claims pursuant to Federal Rules of Civil Procedure, Rule 23 for the certification of a nationwide class of purchasers of Cuisinarts food processors.

The States, after receiving notice from the Department of Justice of the indictment against Cuisinarts,[7] sought all investigative materials relating to the government's criminal action against Cuisinarts in the possession of the United States Attorney General, pursuant to section 4F(b) of the Hart-Scott-Rodino Act. By letter, the Department of Justice advised the States that it would provide a copy of the indictment and civil complaint as well as copies of internal memoranda from the Department's files. The materials used or generated by the grand jury, the Department of Justice stated, would not be made available absent a court order pursuant to Fed. R. Crim. P. 6(e). Accordingly, commencing in January and continuing through March

1981, the attorneys general of fifteen states, individually and in groups, filed motions under section 4F(b) of the Hart-Scott-Rodino Act and Fed. R. Crim. P. 6(e) seeking an order which would allow them to inspect and copy all grand jury materials produced by the federal grand jury's investigation resulting in the criminal indictment of Cuisinarts for resale price maintenance.[8/] The United States did not object to disclosure. Two of the states, Massachusetts and New Jersey, had already brought parens patriae actions against Cuisinarts.[9/] The other thirteen were apparently contemplating such actions.

In considering these motions, Judge Cabranes found that section 4F(b) was not intended to eliminate the showing of compelling and particularized need

required for disclosure of grand jury materials. Because the States had failed to meet this standard, he denied the motions but indicated that such denial would be without prejudice to a renewed application for disclosure upon demonstrating particularized need. This appeal followed.

II.

We are being urged in this interesting case to erode further the secrecy provisions of Fed. R. Crim. P. 6(e) by making available the grand jury minutes and documents in toto, without even a showing of "particularized need." Congress enacted the parens patriae provisions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. §§ 15c-15h (1976), to provide a meaningful remedy for small

consumers injured by antitrust violations. H.R. Rep. No. 499, 94th Cong., 2d Sess. 4-8 (1975), reprinted in [1976] U.S. Code Cong. & Ad. News 2572-78. The provisions of the Act authorize state attorneys general to bring treble damage actions on behalf of all state residents who have been injured by these violations. 15 U.S.C. §15c (1976). Section 4F(b) of the Act offers assistance to state attorneys general in the prosecution of such suits by providing in pertinent part:

> (b) To assist a State attorney general in evaluating the notice or in bringing any action under sections 12 to 27 of this title, the Attorney General of the United States shall, upon request by such State attorney general, make available to him, to the extent permitted by law, any investigative files or other materials which are or may be relevant or material to the actual or potential cause of action under sections 12 to 27 of this title. (emphasis added).

In analyzing the issue of disclosure pursuant to section 4F(b), we are required to weigh two fundamental questions of statutory construction--whether grand jury materials fall within the "investigative files or other materials" language of section 4F(b) and, if so, whether their disclosure is forbidden because section 4F(b) allows release only "to the extent permitted by law."

A.

The States argue that, although the statutory language makes no mention of grand jury materials, such materials in possession of the Department of Justice are part of its "investigative files or other materials." They do acknowledge, however, that the Attorney General is

not required by section 4F(b) to make these particular materials or files available merely upon request. The States recognize the Supreme Court's mandate that disclosure of grand jury materials is solely within the discretion of the court. See Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 399 (1959).

Nevertheless, they overlook the essence of this holding. The grand jury, while maintaining independence in many areas, is fundamentally an arm of the judiciary. See Levine v. United States, 362 U.S. 610, 617 (1960). It is not simply a tool or instrument of the executive or legislative branch. See United States v. Fisher, 455 F.2d 1101, 1105 (2d Cir. 1972). Indeed, grand jury proceedings remain the records of the

courts, and courts must decide whether they should be made public.[10/] Justice Whittaker felicitously expressed this view in his concurring opinion in United States v. Procter & Gamble Co.: "[G]rand jury minutes and transcripts are not the property of the Government's attorneys, agents, or investigators.... Instead, those documents are records of the court." 356 U.S. 677, 684-85 (1958).

Since grand jury materials are traditionally the records of the Judicial Branch, it would be curious logic indeed to deduce from this premise that such materials are included within the Department of Justice's files or materials. We are not unsympathetic to the States' assertion that little would be available if grand jury materials were excluded. Momentary reflection, however, reveals

that such a reading of the statute does not foreclose the possiblity of securing a broad spectrum of other useful materials from the Justice Department's files. For instance, state attorneys general could procure information that the Justice Department obtained through civil discovery and through investigations by its Staff, staff memoranda, and government data and analyses. In addition, the states could gather at least as much, or perhaps more, information through their own civil discovery. Our interpretation of the statutory language, therefore, does not thwart antitrust enforcement. Rather, it reflects the policy that grand jury secrecy is "older than our Nation itself," Pittsburgh Plate Glass Co. v. United States, supra, 360 U.S. at 399.[11/]

Accordingly, we cannot conclude that Congress -- without thoroughly debating the issue and without making specific provision for it -- intended general terminology such as "investigative files or other materials" to embrace grand jury materials. Accord, In re: State of Illinois Petition to Inspect and Copy Grand Jury Materials, No. 81-1294, slip op. at 6-7 (7th Cir. Sept. 16, 1981).[12/]

B.

Our holding is not grounded solely on the "investigative files or other materials" language because section 4F(b) clearly indicates that Congress did not intend to create new standards for disclosure of grand jury materials to state attorneys general. Section 4F(b) provides, also, that investigative

files and other materials are to be made available only "to the extent permitted by law." 15 U.S.C. § 15f(b). Following well-settled principles of statutory construction, we begin with the language of the statute itself. See Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980). As a rule, we must regard the language of the statute as conclusive unless the legislative history contains a direct expression of congressional intent to the contrary. Id.

The law governing grand jury disclosure is set forth in Federal Rules of Criminal Procedure, Rule 6(e)[13/] which provides in pertinent part:

> (2) General Rule of Secrecy. [A]n Attorney for the government...shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules.

(3) Exceptions.

...

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made--

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding; ...

Rule 6(e)(3)(C)(i) does not delineate the standards for determining when materials should be released. The Supreme Court has firmly established, however, that Rule 6(e)(3)(C)(i) specifically prohibits granting access to grand jury materials unless "particularized need" is shown by the requesting party. Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 222 & n.12 (1979); Dennis v. United States, 384 U.S. 855, 872 (1966); Pittsburgh Plate Glass Co. v. United States, supra, 360

U.S. at 400; United States v. Procter & Gamble Co., supra, 356 U.S. at 683.

This restrictive standard gives voice to the important policy considerations which underlie the historic rule of grand jury secrecy. Generally, it has been recognized as we have stated, that the policy of secrecy is essential to the integrity of the grand jury.[14/] If this concern were ignored, individuals who were the subject of a grand jury inquiry might be able to obstruct justice by means that could interfere with the orderly processes of law.[15/] The possibility of retaliation cannot be ignored as a reason for preserving grand jury secrecy.[16/] It is apparent, therefore, that secrecy protects, and was intended to protect, those who appear before the grand jury as

witnesses. Indeed, witnesses before the grand jury, because they are aware of the traditional secrecy enveloping these proceedings, have reason to assume that their presence and their testimony will not be revealed. There is always the risk that, if they knew their statements would readily come to light, their responses to questions could become guarded. As a result, the effectiveness of the grand jury, a public institution serving the community, could suffer.[17/]

Of even greater importance, secrecy safeguards the innocent. A glaring injustice could be inflicted and irreparable injury caused to the reputation of a person if it were to become known that there is or ever was before the grand jury any proceeding concerning him even if he were not subsequently

indicted.[18] Moreover, disclosure of grand jury proceedings could stigmatize individuals not guilty of any crime.[19] Recognizing compelling reasons, some of which we have stated, the Supreme Court has consistently refused to breach the walls of grand jury secrecy absent a showing of particularized need. See Douglas Oil Co. v. Petrol Stops Northwest, supra, 441 U.S. at 219 n.10; United States v. Procter & Gamble Co., supra, 356 U.S. at 681-82 n.6. This need to limit disclosure does not cease entirely after the grand jury has completed its term, but rather remains, albeit somewhat reduced, once the proceedings of the grand jury have been concluded. See Douglas Oil Co. v. Petrol Stops Northwest, supra, 441 U.S. at 222.

The states, however, argue that state attorneys general need not establish particularized need to obtain disclosure, stating that in the Hart-Scott-Rodino Act, Congress expressly acknowledged the special position state attorneys general occupy in Congress's plan for antitrust enforcement. In sum, the States assert that in enacting section 4F(b) Congress balanced the need for disclosure against the interest in grand jury secrecy and reached a resolution in favor of disclosure without particularized need. See also United States v. Colonial Chevrolet Corp., 629 F.2d 943 (4th Cir. 1980), cert. denied sub nom. Certain Unindicted Individuals & Corps. v. United States, 101 S. Ct. 1352 (1981); United States v. B.F. Goodrich Co., 619 F.2d 798 (9th Cir. 1980).[20/]

We disagree with the States' analyses. Section 4F(b), in the most direct language, requires that files be made available only "to the extent permitted by law." At the time this section was enacted, the applicable law included both Rule 6(e) and the Supreme Court decisions requiring particularized need. See Dennis v. United States, supra; Pittsburgh Plate Glass Co. v. United States, supra; United States v. Procter & Gamble Co., supra. To argue, as do the States, that Congress intended district courts to apply only the language of Rule 6(e)(3)(C)(i) and to ignore the particularized need standard when deciding a section 4F(b) request for disclosure denigrates, perhaps unintentionally, Congress's legal acumen.

Certainly, it may be presumed that a knowledgeable body of legislators, dealing extensively with an innovative approach to antitrust enforcement, was well aware that a Supreme Court decision interpreting a statute is at least as much law as a procedural rule promulgated by the Supreme Court and approved by Congress. Furthermore, the phrase "to the extent permitted by law" on its face does not appear to us to provide a clear statement that Congress contemplated establishing a new, more liberal law of disclosure. The contrary seems to be more reasonable.

The suggestion of the states seems particularly implausible when we recognized that Congress directed section 4F(b) to the Attorney General, not to the district courts that apply the

particularized need standard. Nothing in section 4F(b) refers to court-ordered disclosure. Nor is reference made to judicial cooperation with the Attorney General to encourage the enforcement of civil antitrust actions. We are confident that if Congress had intended that district courts should no longer consider requests by state attorneys general to be governed by the particularized need standard, it would have made its intention crystal clear in light of its awareness of the issue.[21] We are certain that Congress would not have altered an important traditional policy such as the '"indispensable secrecy of grand jury proceedings,'" United States v. Procter & Gamble Co., supra, 356 U.S. at 682 (citation omitted), without articulating its will

explicitly.

If more is needed, it is clear that the legislative history, although spare, negates any inference that Congress intended section 4F(b) to modify the standard for disclosure of grand jury materials. During debate, Senator Roman Hruska objected to section 4F(b) stating that it could turn the Department of Justice into a "massive document distribution center." 122 Cong. Rec. 29144 (1976). Responding to this criticism, Senator James Abourezk, Senate Floor Manager for the bill, pointed out: "The section specifically limits the Attorney General's power to release documents to whatever his powers are under existing law. Under existing law, he cannot turn over materials given in response to a grand jury demand or to a civil investi-

ative demand.'"[22/] 122 Cong. Rec. 29160 (1976). We believe, as we have often stated, that a floor manager's interpretations of a statute are authoritative, and his comments during debate should be given weight as we construe statutes. See, e.g., United States v. Oates, 560 F.2d 45, 70 n.26 (2d Cir. 1977); Pan American World Airways, Inc. v. C.A.B., 380 F.2d 770, 782 (2d Cir. 1967), aff'd, 391 U.S. 461 (1968).

Only one other portion of the legislative history directly sheds light upon Congress's understanding of the appropriate standard for disclosure. The House Committee Report on an earlier version of section 4F(b) notes that the phrase "to the extent permitted by law" means that "the files are to be made available except where specifically prohibited."

H.R. Rep. No. 499, 94th Cong., 2d Sess. 17 (1975), reprinted in [1976] U.S. Code & Ad. News 2586. This statement and Senator Abourezk's remarks clearly lead to the same conclusion -- that Rule 6(e)(3)(C)(i), as construed by the Supreme Court, the existing law then as now, forbids disclosure without a showing of particularized need. See United States v. Procter & Gamble Co., supra.

Finally, the States contend that the purpose of the Hart-Scott-Rodino Act -- to foster effective state antitrust enforcement -- places state attorneys general in a preferred position relative to that of private plaintiffs in the enforcement of federal antitrust laws. Therefore, they argue, Congress must have intended to relieve them of the

requirement of showing particularized need. The Fourth and the Ninth Circuits have adopted this rationale, see United States v. Colonial Chevrolet Corp., supra; United States v. B.F. Goodrich Co., supra, while the Seventh Circuit has expressly rejected it. See In re: State of Illinois, supra. We find the latter position to be sounder. We do not believe that simply because Congress augmented the role of state attorneys general in the federal antitrust enforcement scheme, it necessarily, or logically, follows that Rule 6(e) was diluted sub silentio and should, therefore, be read to alter the standard for release of grand jury materials.

It is true that by authorizing states to institute civil antitrust actions as parens patriae, the Hart-Scott-Rodino

Act carves out a special place for state governments in enforcing federal antitrust laws. These actions, however, were essentially directed toward remedying inadequacies in the existing scheme of enforcement which affected the usefulness of private consumer class actions and were barriers to suits brought by small consumers. See Scher, Emerging Issues Under the Antitrust Improvements Act of 1976, 77 Colum. L. Rev. 679, 711-39 (1977). The basic problems addressed were the difficulty of achieving class certification of consumer actions pursuant to Federal Rules of Civil Procedure, Rule 23, see H.R. Rep. No. 499, 94th Cong., 2d Sess. 6-8 (1975), reprinted in [1976] U.S. Code Cong. & Ad. News 2576-77, and the complexity of measuring and distributing

damages in class actions, see id. at 11-17, reprinted in [1976] U.S. Code Cong. & Ad. News 2583-84; Kintner, Griffin & Goldston, The Hart-Scott-Rodino Antitrust Improvements Act of 1976: An Analysis, 46 Geo. Wash. L. Rev. 1, 19-20 (1977). In effect, the thrust of Title III of the Act was to overcome obstacles to private class actions through enabling state attorneys general to function more efficiently as consumer advocates. See H.R. Rep. No. 499, 94th Cong., 2d Sess. 8 (1975), reprinted in [1976] U.S. Code Cong. & Ad. News 2578. Accordingly, Congress removed the barrier presented by Rule 23 by eliminating the requirement of class certification in parens patriae actions. See 15 U.S.C. 15c(a). In addition, it made the actions less complex by permitting

damages to be computed through aggregation techniques. See U.S.C. 15d.

As Judge Cabranes correctly pointed out, discovery issues were not of pressing moment to the draftsmen. They responded primarily to the concern that the individual consumer could not hope to employ the investigative resources necessary to uncover a possible conspiracy in violation of the antitrust laws. See H.R. Rep. No. 499, 94th Cong. 2d Sess. 5-8, reprinted in [1976] U.S. Code Cong. & Ad. News 2575-76. Such an inability, the draftsmen clearly were aware, could be rectified by garnering the discovery resources of the class or the state government in a parens partiae suit. Thus, we conclude, as did Judge Cabranes, that the draftsmen's actual purpose was to mitigate the problems

posed by the individual consumers' paucity of financial resources. Surely, if Congress had perceived limitations imposed upon discovery by the Federal Rules of Civil Procedure or the Federal Rules of Criminal Procedure as deterrents to antitrust enforcement, it would have raised and resolved them. Nothing in the reports of the relevant Congressional committees evidences such a concern or intention. Accordingly, we cannot deduce that Congress intended to alter or dispense with the existing rules.

Moreover, both in these and in other circumstances, governmental and other entities acting in the public interest have been required to meet the standard of particularized need when requesting grand jury materials. See, e.g., In re:

State of Illinois, supra; Texas v. United States Steel Corp., 546 F.2d 626 (5th Cir.), cert. denied, 434 U.S. 889 (1977); Note, Disclosure of Grand Jury Materials in Parens Patriae Actions, 81 Colum. L. Rev. 410, 417-19 (1981). Indeed, we, for instance, have recently denied the request of a public entity, the Grievance Committee of the Connecticut State Bar, for access to grand jury materials. United States v. Sobotka, 623 F.2d 764 (2d Cir. 1980). We acknowledged that the Committee was a public entity charged with performing a duty in the public interest -- maintaining the integrity of the legal profession. Id. at 767. We refused to release the materials nevertheless, because the Committee had not established particularized need. Id. at 768.

That standard, we noted, applies to public entities as well as private parties. Id.

To summarize what we have concluded, we note that the decisions of the Supreme Court, the language of the statute and its legislative history do not lead us to the conclusion the States would have us reach. Rather than modifying the law governing release of grand jury materials, the statute distinctly and precisely states that investigative files or other materials shall be made available only "to the extent permitted by law." Indeed, as we have noted, an examination of the legislative history reveals a forceful indication that section 4F(b) was not intended to transform the existing law of disclosure.

We conclude, therefore, that section 4F(b) does not free state attorneys general from the traditional obligation to establish particularized need to obtain disclosure.

Accordingly, we affirm the order of the district court.

FOOTNOTES

1/ Section 4F of Title III, 15 U.S.C. §15f provides:

> (a) Whenever the Attorney General of the United States has brought an action under the antitrust laws, and he has reason to believe that any State attorney general would be entitled to bring an action under sections 12 to 27 of this title based substantially on the same alleged violation of the antitrust laws, he shall promptly give written notification thereof to such State attorney general.
>
> (b) To assist a State attorney general in evaluating the notice or in bringing any action under section 12 to 27 of this title, the Attorney General of the United States shall, upon request by such State attorney general, make available to him, to the extent permitted by law, investigative files or other materials which are or may be relevant or material to the actual or potential cause of action under sections 12 to 27 of this title.

2/ Subsequent to oral argument, the United States filed a motion to intervene in this appeal. The Government had filed main and reply briefs prior to argument, which set forth its

position but did not indicate its status in this Court. The attorney for the United States appeared at oral argument and, with the Court's leave, presented its position, which differed slightly from the States' but generally supported disclosure without a showing of particularized need. At argument, we asked the Government to clarify its status by filing a motion for leave to intervene pursuant to Federal Rules of Appellate Procedure, Rule 15 (d). We believe the Government has a significant interest in these proceedings because the grand jury materials the States seek are in the possession of the Department of Justice. Accordingly, we grant the Government's motion for leave to intervene.

3/ United States v. Colonial Chevrolet Corp., 629 F.2d 943 (4th Cir. 1980), cert. denied sub nom. Certain Unindicted Individuals & Corps. v. United States, 101 S. Ct. 1352 (1981).

4/ United States v. B.F. Goodrich Co., 619 F.2d 798 (9th Cir. 1980).

5/ In re: State of Illinois Petition to Inspect and Copy Grand Jury Materials, No. 81-1294 (7th Cir. Sept. 16, 1981).

6/ Federal Rules of Criminal Procedure, Rule 6(e) provides in pertinent part:

(3) Exceptions

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made --

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding;...

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

7/ The Department of Justice notified the State attorneys general of the indictment charging Cuisinarts with a violation of section 1 of the Sherman Act in compliance with section 4F(a) of Title III of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 15f(a) (1976). This provision requires the Attorney General of the United States, "[w]henever [he] has brought an action under the antitrust laws, and he has reason to believe that any State attorney general would be entitled to bring an action [under this parens patriae authority] based substantially on the same alleged violation of the antitrust laws," to "promptly give written notification thereof to such State attorney general."

8/ Fourteen of the fifteen states that filed motions seeking access to the grand jury materials appeal from the district court's order denying their motions. The fifteenth, the Commonwealth of Pennsylvania, has not joined in the instant appeal. Rather, it supports reversal of the district court's holding as amicus curiae along with the States of Alabama, Alaska, Arizona, Arkansas, Delaware, Florida, Hawaii, Illinois, Indiana, Iowa, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Mexico, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Utah, Washington, West Virginia, Wyoming, the Commonwealth of Kentucky, and the District of Columbia.

9/ When Massachusetts and New Jersey filed their parens patriae complaints, they also served Cuisinarts with discovery demands pursuant to Rules 33 and 34 of the Federal Rules of Civil Procedure. Appellants Connecticut and Maryland, although not parens patriae plaintiffs in civil actions, addressed investigative demands to Cuisinarts under authority of their own state statutes prior to petitioning the district court for release of grand jury materials. Appellant North Carolina addressed an investigative demand to Cuisinarts during the pendency of its motion before the district court.

10/ In an analogous context, courts and the Department of Justice have not considered grand jury materials records

of the Department of Justice, although the Department has these materials in its possession. The Freedom of Information Act (FOIA), 5 U.S.C. § 552 (1976) makes "agency records" available to any person upon request. Although agency possession, in some cases, is sufficient to make certain materials "agency records," such is not always the case. Note, The Definition of "Agency Records" under the Freedom of Information Act, 31 Stan. L. Rev. 1093, 1106-09 (1979). See Valenti v. United States Dep't of Justice, 503 F. Supp. 230 (E.D. La. 1980).

11/ We acknowledge that the traditional rule of grand jury secrecy has been subject to criticism. One commentator, for instance, has theorized that the policy of secrecy evolved, historically, in too expansive a manner. He concludes that jurisdictions which follow traditional rules do so without necessity. Sherry, Grand Jury Minutes: The Unreasonable Rule of Secrecy, 48 Va. L. Rev. 668, 669 (1962). Others suggest that the dismissal of the grand jury marks the end of the need for secrecy. Hassett, Ex Parte Pre-Trial Discovery: The Real Vice of Parallel Investigations, 36 Wash. & Lee L. Rev. 1049, 1058 (1979).

We are aware of these arguments, and recognize that an emphasis on secrecy may impair other values. For example, since grand jury proceedings are ex parte in nature, they lack the fundamental protections of due process and may generate misleading or ambiguous

information that would likely be corrected in an adversary proceeding. See United States v. Scully, 225 F.2d 113, 116 (2d Cir.), cert. denied, 350 U.S. 897 (1955) (in grand jury proceedings "there is no right to counsel, no right of confrontation, no right to cross-examine or to introduce evidence in rebuttal and ordinarily no requirement that the evidence introduced be only such as would be admissible upon a trial" (citation omitted)).

12/ The Fourth and the Ninth Circuits found that grand jury materials are included in the terminology "investigative files and other materials." See United States v. Colonial Chevrolet Corp., supra, 629 F.2d at 947; United States v. B.F. Goodrich Co., supra, 619 F.2d at 800.

13/ Fed. R. Crim. P., Rule 6(e)(2) codifies the traditional rule of grand jury secrecy. Kaufman, The Grand Jury -- Its Role and Its Powers, 17 F.R.D. 331 (1954).

14/ Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 218 (1979).

15/ Id. at 219; see United States v. Procter & Gamble Co., 356 U.S. 677, 681-82 n.6 (1958) (citing United States v. Rose, 215 F.2d 617, 628-29 (3d Cir. 1954)).

16/ Douglas Oil Co. v. Petrol Stops Northwest, supra, 441 U.S. at 219; United States v. Procter & Gamble Co., supra, 356 U.S. at 682.

17/ See United States v. Procter & Gamble Co., supra, 356 U.S. at 681-82.

18/ See Douglas Oil Co. v. Petrol Stops Northwest, supra, 441 U.S. at 219; United States v. Procter & Gamble Co., supra, 356 U.S. at 681-82 n.6.

19/ Id. See Note, Disclosure of Grand Jury Materials Under Clayton Act Section 4F(b), 79 Mich. L. Rev. 1234, 1257-69 (discussing need for grand jury secrecy in relation to section 4F(b)).

20/ Both the Fourth and the Ninth Circuits held that, pursuant to section 4F(b), state attorneys general are not required to demonstrate a particularized need. United States v. Colonial Chevrolet Corp., supra, 629 F.2d at 950; United States v. B.F. Goodrich Co., supra, 619 F.2d at 801. The Fourth Circuit did not hold that state attorneys general have an absolute right to disclosure but rather that "the burden of opposing disclosure in such a situation rests on those who would deny disclosure." United States v. Colonial Chevrolet Corp., supra, 629 F.2d at 951.

21/ When considering the Hart-Scott-Rodino Act Congress was well aware of the particularized need standard. The Senate version of the Act, of which section 4F(b) was a part, included a pro-

vision, § 202(1), that would have afforded all civil antitrust plaintiffs access to grand jury materials after completion of the federal case. S. Rep. No. 803, 94th Cong., 2d Sess. 110 (1976). The Report refers directly to the particularized need standard and the discretion of a trial judge to grant or deny disclosure. Id. at 33. Since the Senate upheld this standard by rejecting the provision, it would be unlikely that Congress intended section 4F(b) to alter that standard without explicitly stating so. We recognize that a change in a statute during the course of enactment is not necessarily a dispositive indication of Congressional intent, but we do believe express rejection of a specific provision may be significant. See Fox v. Standard Oil Co., 294 U.S. 87, 96 (1935).

22/ The Hart-Scott-Rodino Act, in addition to its parens patriae provisions, amended the Antitrust Civil Process Act to increase the Department of Justice's civil investigative demand powers. See 15 U.S.C. §§ 1311-14 (1976) (amended 1979). Although civil investigative demand materials would aid state enforcement of federal antitrust laws, the Act mandates that such materials be kept strictly confidential. 15 U.S.C. § 1313 (1976) (amended 1980). Such a requirement was imposed to safeguard the rights of individuals under investigation and to protect witnesses from retaliation. See H.R. Rep. No. 1343, 94th Cong. 2d Sess. 7-8 (1976), reprinted in [1976] U.S. Code Cong. & Ad.

News 2602; S. Rep. No. 803, 94th Cong. 2d Sess. 204 (1976). It would be curious indeed to read section 4F(b) as if it were intended to liberalize Rule 6(e)'s disclosure requirements and not to interpret it also to make the civil investigative restrictions less strict -- particularly because similar policies support secrecy in both instances. Such a reading, however, would be quite difficult to reconcile with the strictures imposed on disclosure of civil investigative demands incorporated in the same act as section 4F(b). Logic would dictate that section 4F(b), therefore, cannot be interpreted as establishing a new, more liberal law of disclosure.

In re Grand Jury
Investigation of
Cuisinarts, Inc.

In re Grand Jury
Investigation of
Cuisinarts, Inc.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 81-7338

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the nineteenth day of November one thousand nine hundred and eighty-one.

Present:

HON. IRVING R. KAUFMAN
HON. THOMAS J. MESKILL

Circuit Judges

HON. DUDLEY B. BONSAL,

District Judge

IN RE: GRAND JURY INVESTIGATION
OF CUISINARTS, INC.

State of Connecticut,
Commonwealth of Massachusetts,
State of Rhode Island and
Providence Plantations, State of Vermont,
State of New York, State of Colorado,
State of New Jersey,
State of North Carolina, State of Maine,
State of New Hampshire,
State of Maryland,
Commonwealth of Virginia,
State of Texas, State of Wisconsin,

Plaintiffs-Appellants

v.

Cuisinarts, Inc.,

Defendant-Appellee

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellants.

A. DANIEL FUSARO, Clerk

by /s/ ARTHUR HELLER
Arthur Heller,
Deputy CLerk

Filed
November 19, 1981
United States Court of Appeals
Second Circuit
A. Daniel Fusaro, Clerk

APPENDIX C

Order Of The Court Of Appeals For
The Second Circuit, December 17, 1981

UNITED STATES COURT OF APPEALS
For The Second Circuit December 17, 1981

Before

Hon. IRVING R. KAUFMAN,
HON. THOMAS J. MESKILL,
Circuit Judges

Hon. DUDLEY B. BONSAL,
District Judge

No. 81-7334

IN RE: GRAND JURY	)	Appeal from the
	)	United States
INVESTIGATION OF	)	District Court for
	)	the District of
CUISINARTS, Inc.	)	Connecticut,
	)	
	)	No. H 81-224
	)	Judge Jose A. Cabranes

On consideration of the "MOTION FOR STAY OF MANDATE PENDING DETERMINATION OF APPLICATION FOR CERTIORARI" filed herein on December 10, 1981, by counsel for State of Connecticut,

IT IS ORDERED that said motion is hereby GRANTED and the mandate of this court is hereby STAYED pursuant to Federal Rule of Appellate Procedure 41(b).

APPENDIX D

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

IN RE GRAND JURY :
INVESTIGATION OF : CIVIL NO. H 81-224
CUISINARTS, INC. :

APPEARANCES:

ALAN L. KOVACS
PAUL C. BISHOP
Assistant Attorneys General
Commonwealth of Massachusetts
Boston, Massachusetts

For the Petitioners, the attorneys general of the states of Colorado, Connecticut, Maine, Maryland, New Hampshire, New Jersey, New York, North Carolina, Rhode Island, Texas, Vermont, and Wisconsin, and the Commonwealths of Massachusetts, Pennsylvania, and Virginia

ARTHUR M. HANDLER
MICHAEL M. MEADVIN
Golenbock and Barell
New York, New York

For the Respondent, Cuisinarts, Inc.

JANE C. LUXTON
United States Department of Justice
Antitrust Division
Washington, D.C.

For the United States of America

RULING ON MOTION TO INSPECT AND COPY GRAND JURY MATERIALS

JOSE A. CABRANES, District Judge:

The attorneys general of fifteen states commenced this proceeding pursuant to Rule 6(e), Fed. R. Crim. P., and Section 4F(b) of the Clayton Act, 15 U.S.C. §15f(b). They moved the court for an order allowing them to inspect and copy all grand jury materials, including transcripts of the testimony of grand jury witnesses, and documents and exhibits gathered or generated pursuant to a federal grand jury's investigation of Cuisinarts, Inc. ("Cuisinarts"). That grand jury investigation had resulted, on September 17, 1980, in the return of an indictment and the filing of the criminal action, United States of America v. Cuisinarts, Inc., Crim. No. H 80-49.

On March 30, 1981, the court heard oral argument on the motion of the state attorneys general. Oral presentations were made by an Assistant Attorney General of the Commonwealth of Massachusetts, on behalf of all fifteen attorneys general who had joined in this proceeding; by counsel for the respondent, Cuisinarts; and by a staff attorney of the Antitrust Division, United States Department of Justice, on behalf of the United States, which has maintained custody of the grand jury materials at issue here. At the close of that hearing, the court issued an oral ruling which denied petitioners' motion to inspect and copy grand jury materials. This opinion sets forth in greater detail the reasons for the court's ruling.

Background

This motion is part of a complex litigation resulting from the alleged unlawful conduct of Cuisinarts. A brief review of that litigation is useful to an understanding of this proceeding. Cuisinarts distributes, throughout the United States, electric appliances known as food processors. On September 17, 1980, Cuisinarts was charged, in a one-count indictment, with having conspired to fix, stabilize, and maintain the retail prices which it had previously set for its food processors. The indictment alleged that such resale price maintenance amounted to a combination and conspiracy in unreasonable restraint of interstate trade and commerce, and thus constituted a felony violation of Section One of the Sherman Act, as amended, 15

U.S.C. §1. The indictment was returned by a grand jury which had been impaneled by this court. See United States of America v. Cuisinarts, Inc., Crim. No. H 80-49 (D. Conn.).

Also on September 17, 1980, the United States filed a civil complaint against Cuisinarts, which was captioned United States of America v. Cuisinarts, Inc., Civil No. H 80-559 (D. Conn.). That complaint stated essentially the same factual allegations as the grand jury's indictment, and claimed injunctive relief.

Both of the actions which had been commenced by the United States were substantially resolved on December 19, 1980. With respect to the criminal charge, defendant Cuisinarts entered, and the court accepted, a plea of nolo

contendere. With respect to the civil action, counsel for the United States and for Cuisinarts stipulated on that date to the terms of a proposed Final Judgment.

In the criminal action, the court's acceptance of the plea of nolo contendere was based, in part, on certain representations by the United States. In its written statement to the court, the Justice Department had noted that its "policy is to oppose nolo pleas, unless there are unusual circumstances such that a nolo plea would be in the public interest." It added, however, that because of several factors, it "believe[d] that, in this case, the public interest is better served by the proposed disposition of the entire case at an early date in the litigation."

First, the Justice Department observed that the indictment in United States of America v. Cuisinarts, Inc. was "against a single corporation rather than a group of corporations and individuals." Thus, the government stated, an early disposition of the case would "allow the Justice Department to utilize its resources in other investigations." Second, the government "consider[ed] an early successful disposition of this case to be important for the overall antitrust law enforcement program of the Department," because the indictment of Cuisinarts was "the first indictment for vertical price fixing since the penalty for violating the Sherman Act was increased to a felony."[1/] Finally, the United States also "consider[ed] the defendant's acquiescence, subject to the

court's determination, in a fine of $250,000, as a satisfactory resolution and an additional factor in favor of the proposed disposition. "Memorandum of the United States Concerning its Proposed Plea Agreement with Cuisinarts, Inc. 1-2 (Crim. No. H 80-49, Dec. 19, 1980).

The United States argued "that $250,000 is a substantial fine and is appropriate in this case," because of "the inherent risk of litigation in the case"; because "prosecutions for vertical price fixing have been less frequent than prosecutions for horizontal price fixing . . . [;]" and because "there is no recent history of such violations[.]" Transcript of Change of Plea and Disposition ("Change of Plea") at 16 (Crim. No. H80-49, Dec. 19, 1980). The United

States argued also that it had "considered the corporate size of the defendant, its sales volume, and its net income . . . and [it] concluded that a fine of $250,000 would be substantial enough to be a significant penalty on this corporation, and yet not hinder this corporation's ability to compete in the marketplace." Id.[2/]

After giving due consideration to the views of both the United States and Cuisinarts, the court concluded that a plea of nolo contendere would, in the circumstances of this case, serve the interest of the public in the effective administration of justice. Accordingly, pursuant to Rule 11(b), Fed. R. Crim. P., the court accepted defendant's plea of nolo contendere. See Change of Plea 25-29. Furthermore, pursuant to Rules

11(e)(1)(B) and 11(e)(3), Fed. R. Crim. P., the court accepted the government's recommendation concerning sentencing. Change of Plea 31-32. The Court imposed a fine of $250,000, which was paid in full less than a week later.

Also on December 19, 1980, counsel for the government and for defendant stipulated to the submission of a proposed Final Judgment in the civil action. Pursuant to the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. § 16(b)-(h), the terms of that proposed Final Judgment and a competitive impact statement were published in the Federal Register and in newspapers of general circulation in Washington, D.C. and in this District more than sixty days prior to the projected entry of the Final Judgment. On March 20, 1981, the

Justice Department certified its compliance with the requirement of the APPA, and reported that no comments of any kind had been submitted concerning the proposed Judgment. On March 26, 1981, the court found the terms of the proposed Judgment to be in the public interest, and adopted the proposed terms as its Final Judgment. Under that Judgment, which was entered on March 27, 1981, defendant Cuisinarts is enjoined from, among other things, fixing the prices at which its food processors may be resold, or from denying its products to retail dealers on account of the purchasers to whom those products might be sold. In accordance with the Judgment, notice of the terms to which Cuisinarts consented has been sent to Cuisinarts' retail dealers.

This recently-concluded litigation by the federal government -- involving as it did the first criminal prosecution for vertical price fixing in many years, at least since the penalty for violating the Sherman Act was increased to a felony in 1974 -- has spawned a large, and possibly growing, number of cases involving private consumers and state governments. Within weeks of the federal indictment, a number of private antitrust actions had been filed against Cuisinarts or its retailers. On January 16, 1981, the Judicial Panel on Multi-district Litigation ("JPML") ordered, pursuant to 28 U.S.C. § 1407, that eight such actions be consolidated for pre-trial proceedings in this court.[3/] Pursuant to the JPML's order, those consolidated proceedings are captioned In Re

Cuisinart Food Processor Antitrust Litigation, MDL Docket No. 447. On February 23, 1981, the Panel entered conditional transfer orders in four other cases against Cuisinarts and its retailers. On March 11, 1981, absent objection, these orders became final and the four so-called "tag-along" cases were consolidated for pre-trial proceedings along with the other cases already before this court.[4/] Among these four cases was a parens patriae action brought by the Commonwealth of Massachusetts.[5/]

A second parens patriae action has also become part of this litigation. On February 20, 1981, the state of New Jersey commenced a parens patriae action, State of New Jersey v. Cuisinarts, Inc., in the United States District Court for the District of New Jersey. On March 2,

1981, the parties stipulated to the transfer of that action to this court pursuant to 28 U.S.C. § 1404, and on March 3, 1981, the District Court in New Jersey ordered that transfer. Counsel for the state of New Jersey appeared at the first pre-trial conference in the consolidated litigation on March 5, 1981, and the New Jersey parens patriae action has been a full part of all pre-trial proceedings since that date.

One other private action was recently transferred to, and dismissed by, this court. On April 3, 1981, the JPML ordered that Audrey Schenk v. Carl Sontheimer, et al., which had been filed on March 19, 1981, be transferred from the United States District Court for the Southern District of New York to this court for consolidation with the other

thirteen food processor antitrust actions then pending. The transfer of the Schnek case was effective as of May 11, 1981. On May 29, 1981, plaintiff Schenk filed a motion for voluntary dismissal of her action, with prejudice. On June 1, 1981, the court granted the motion, absent objection, with prejudice to plaintiff Schenk, but without prejudice to any members of the putative class which she claimed to represent.

Thus thirteen civil actions are presently before this court for consolidated pre-trial proceedings. Of these, two are parens patriae actions. Of the remaining eleven cases, seven include claims, under Rule 23, Fed. R. Civ. P., for the certification of a nationwide class of purchasers of Cuisinart food processors.[6/]

Before the court, in this proceeding, were the attorneys general of fifteen states. These included Massachusetts and New Jersey, which have already brought parens patriae actions, and thirteen other states which are apparently contemplating such actions.[7/] All of these states acted pursuant to Section 4F(b) of the Clayton Act, 15 U.S.C. § 15f(b), and Rule 6(e), Fed. R. Crim. P. They all sought, as the motion filed by the State of Connecticut put it, "an order allowing 'them' to inspect and copy all grand jury materials, including transcripts of the testimony of grand jury witneses, and documents and exhibits gathered or generated pursuant to the federal grand jury's investigation which resulted in the . . . complaint 'in United States v. Cuisinarts, Inc., Crim.

No. H 80-49]." Motion to Inspect and Copy Grand Jury Materials (Jan. 5, 1981).[8/]

Petitioners' motion was directed to the discretion of the court. Douglas Oil Co. v. Petrol Stops Northwest ("Douglas Oil"), 441 U.S. 211, 223 (1979). The court reviewed the thorough memoranda of all counsel, and the authorities cited in them. It also considered the particular circumstances of this litigation. For the reasons set forth below, the court denied the motion of the state attorneys general, and accordingly shall not, at this time and as part of this proceeding, permit the disclosure of any of the materials which had been gathered or generated in connection with the grand jury's investigation of Cuisinarts.

The Court's Jurisdiction

Petitioners originally filed this motion as part of the government's criminal action against Cuisinarts (Crim. No. H 80-49). However, at oral argument, Cuisinarts challenged, for the first time, the jurisdiction of the court to decide the motion of the state attorneys general as part of that criminal action. See Transcript of Proceedings on Motion to Obtain Grand Jury Materials ("Tr.") 52-56 (March 30, 1981). In particular, Cuisinarts relied on United States v. Armco Steel Corp., 458 F. Supp. 784 (W.D. Mo. 1978) ("Armco Steel"), which held, according to counsel for Cuisinarts, that a court lacks jurisdiction to rule on motions which are filed in connection with criminal actions which have previously been closed. Tr. 52. Since the criminal case, United

States of America v. Cuisinarts, Inc., had been closed on December 19, 1980 -- the date on which defendant had changed its plea and the court had imposed its sentence -- counsel for Cuisinarts argued that the court lacked jurisdiction to hear the states' motion. Tr. 52, 54.

In Armco Steel, supra, a federal grand jury had been impaneled, and subsequently returned an indictment in the United States District Court for the Western District of Missouri. Later, a civil action based on similar allegations was brought in the United States District Court for the District of Kansas. Plaintiff in the Kansas civil action then moved, in the closed criminal action in the Western District of Missouri, for an order that the grand jury's documents be produced and disclosed.

In ruling on the motion for production of the grand jury materials, the court in Armco Steel held that, the criminal case having been concluded, it lacked jurisdiction to enter orders in connection with that action. The court stated that "[t]he proper method of bringing the instant controversy before the Court would have been the commencement of an independent proceeding in this district." Armco Steel, supra, 458 F. Supp. at 787. The court recognized, however, that all parties had previously appeared in the Western District of Missouri to argue the merits of the motion for disclosure of the grand jury materials. Accordingly, it simply ordered its Clerk to convert the pleadings into an independent proceeding, and to give that proceeding a civil

docket number for purposes of the court's records. Id. at 788-789.

Thus Armco Steel, supra, holds only that a court may not rule on a motion which has been filed in connection with a closed criminal case. Nothing in that case suggests that, were the motion in the criminal action against Cuisinarts to be converted into an independent civil proceeding, this court would lack the jurisdiction to decide it. Moreover, no party to this proceeding, either in its papers or at oral argument, suggested either that the court lacked the power to convert the proceedings in that manner, or that, if the motion had been framed as an independent civil proceeding, the court would lack the jurisdiction to decide it.

At oral argument, it appeared that the substantive basis for Cuisinarts' challenge to the jurisdiction of the court was the concern of counsel that, if proceedings on the motion were to be conducted as part of the closed criminal case, Cuisinarts might be denied appellate review of an adverse decision. Tr. 55.[9/] At the same time, counsel for Cuisinarts both conceded that any such problems of appellate review could be eliminated by restyling these proceedings as a civil action with a new caption, and consented to such a procedure. Tr. 56. Counsel for petitioners similarly consented to a refashioning of the proceedings. Tr. 84. Accordingly, in order to eliminate any possibility of the denial for appellate review, and with the consent of counsel for both

petitioners and respondent, the court directed the Clerk of the Court to recaption the proceeding as a civil action. Moreover, with the consent of all parties, the court stated that the papers filed by the parties would be deemed to have been filed in the separate civil action, a docket for which would be established by the Clerk. Tr. 93-94. Therefore, the proceedings to be held in connection with the Motion to Inspect and Copy Grand Jury Materials, originally filed by the state attorneys general as part of the closed criminal case, are hence forth to be known as In Re Grand Jury Investigation of Cuisinarts, Inc., Civil No. H 81-224.

The Merits of Petioners' Motion

Petitioners bring their motion pursuant to Rule 6(e), Fed. R. Crim. P., and

Section 4F(b) of the Clayton Act, 15 U.S.C. §15f(b). Rule 6(e)(2), Fed. R. Crim. P., codifies the "general rule" that "matters occurring before the grand jury" shall "not [be] disclose[d]". Rule 6(e)(3) then enumerates several exceptions to the general rule. In particular, Rule 6(e)(3)(C)(i), on which petitioners rely, permits disclosure of matters occurring before the grand jury "when so directed by a court preliminarily to or in connection with a judicial proceeding [.]" As interpreted by the Supreme Court, however, this exception may properly be invoked only when the party seeking disclosure can show that the need for the grand jury material outweighs the interests in secrecy. In short, the moving party must show a "compelling necessity" for breaking the

"indispensable secrecy of grand jury proceedings" and that need "must be shown with particularity." United States v. Procter & Gamble Co. ("Procter & Gamble"), 356 U.S. 677, 682 (1958); see also Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 400 (1959); Dennis v. United States, 384 U.S. 855, 869-870 (1966); Douglas Oil, supra, 441 U.S. at 220-222.

The question before the court, which is apparently one of first impression in this Circuit, concerns the relationship between Rule 6(e) and the recently-enacted Section 4F(b) of the Clayton Act, 15 U.S.C. § 15f(b). Section 4F(a) of the Clayton Act, 15 U.S.C. § 15f(a), enacted at the same time as Section 4F(b), provides that whenever the federal government has brought an action under

the antitrust laws, and the Attorney General of the United States has reason to believe that a state attorney general would be entitled to bring an action based on substantially the same alleged violation of the antitrust laws, he shall promptly give written notification to the states of that fact. Section 4F(b) then provides, in full, as follows:

> To assist a State attorney general in evaluating the notice or in bringing any action under sections 12 to 27 of this title, the Attorney General of the United States shall, upon request by such State attorney general, make available to him, to the extent permitted by law, any investigative files or other materials which are or may be relevant or material to the actual or potential cause of action under sections 12 to 27 of this title.

In their memoranda and at oral argument, the state attorneys general asserted several propositions: first,

that the Hart-Scott-Rodino Antitrust Improvement Act of 1976 ("Hart-Scott-Rodino"), which amended the Clayton Act to include Section 4F(b), was intended to increase the involvement of state officials in the enforcement of federal antitrust laws; second, that grand jury documents are among the materials intended by Section 4F(b) to be disclosed; and third, that Section 4F(b) eliminates, for state attorneys general acting pursuant to the Clayton Act, the traditional requirement that a litigant seeking access to grand jury materials must show a compelling and particularized need for those materials.

Having reviewed the legislative history of Hart-Scott-Rodino, the court concludes that, as a general matter, the

statute sweeps less broadly, and thus elevates the state role in antitrust enforcement to a lesser extent, than the petitioners assert. By authorizing states to bring civil antitrust actions, as parens patriae, Hart-Scott-Rodino does create a place for state governments in the enforcement of federal antitrust laws. Those parens patriae actions were intended, however, to fill only a narrow gap in the prior scheme of enforcement. The draftsmen of Hart-Scott-Rodino noted two technical problems which limited the usefulness, and thus deterred the filing, of private consumer class actions. The first problem was the difficulty, under Rule 23, Fed. R. Civ. P., of gaining class certification,

see [1976] U.S. Code Cong. & Ad. News 2576-2577; the second was the difficulty of "managing" such an action, once a class has been certified, id. at 2583-2584.[10/] Hart-Scott-Rodino attempts to solve both problems.

The concept of a parens patriae suit had long been known at common law. In the United States, it had evolved into a means by which a state could "sue in its quasi-sovereign capacity on behalf of its citizens to prevent interference with flow of good or natural resources" into the state or "to prevent acts of pollution." Kintner, Griffin & Goldston, The Hart-Scott-Rodino Antitrust Improvements Act of 1976: An Analysis ("Hart-Scott-Rodino: An Analysis"), 46 Geo. Wash. L. Rev. 1, 18-19 (1977). Although the parens patriae action was recognized

to be the most efficient means of overcoming the obstacles to private class actions, judicial decisions in the early 1970's had limited the ability of states to bring such suits to remedy antitrust violations. Hart-Scott-Rodino: An Analysis 19; see Hawaii v. Standard Oil Co., 405 U.S. 251 (1972); California v. Frito-Lay, Inc., 474 F.2d 774 (9th Cir.), cert. denied, 412 U.S. 908 (1973). Reacting to these decisions, see [1976] U.S. Code Cong. & Ad. News 577-2578, Congress, in Hart-Scott-Rodino, authorized the states to proceed as parens patriae in antitrust cases. Congress solved the problem created by Rule 23, Fed. R. Civ. P., simply by making clear that class certification would not be required in parens patriae actions, see 15 U.S.C. § 15c(a). It solved the chief

problem in managing such actions by permitting damages to be computed through aggregation techniques, see 15 U.S.C. §15d.

Discovery problems were not of apparent concern to the draftsmen of the parens patriae provisions. With respect to discovery issues, the draftsmen noted only that the individual consumer lacked the investigative resources to disclose a possible conspiracy in violation of the antitrust laws. See [1976] U.S. Code Cong. & Ad. News 2575-2576. The draftsmen clearly recognized that either a class action or a parens patriae action could solve this problem by putting the resources of the class or the state govenment to work in discovery. Thus the only apparent concern of the draftsmen with respect to discovery was that of

overcoming the individual litigant's lack of financial resources. Significantly, the reports of the relevant Congressional committees never mention as a problem in antitrust enforcement any substantive limitations on discovery imposed by the Federal Rules of Civil Procedure or the Federal Rules of Criminal Procedure.

Thus Hart-Scott-Rodino is but "a limited legislative response to [a] perceived loophole in antitrust liability". Hart-Scott-Rodino: An Analysis 19-20 (emphasis supplied). It provides specific, carefully tailored solutions to technical problems of antitrust enforcement. There is no indication that its draftsmen ever regarded the existing rules of procedure concerning discovery as a problem in such enforcement, or that they intended to

modify, no less contravene, the existing rules.

This conclusion is supported by the plain language of Section 4F(b). Assuming, without deciding, that the term "investigative files or other materials," includes grand jury documents and transcripts,[11/] the disclosure of such grand jury materials under Section 4F(b) is nevertheless explicitly limited "to the extent permitted by law." No other provision of Hart-Scott-Rodino refers to the right of state attorneys general to obtain Justice Department investigative files or other materials. Thus, if the phrase "to the extent permitted by law" is to have any significance at all, it must refer to other, pre-existing rules concerning the disclosure of grand jury materials. Rule 6(e), Fed. R. Crim. P.,

supplies the existing rules concerning such disclosure, and it specifically limits the extent to which disclosure is permitted. Indeed, as interpreted by the Supreme Court, Rule 6(e) specifically prohibits the disclosure of grand jury documents, even for use in another judicial proceeding, except upon a showing of compelling and particularized need. See Procter & Gamble, supra, 356 U.S. at 682; Douglas Oil, supra, 441 U.S. at 220-224.

Petitioners find no limitations in Section 4F(b). Indeed, they contend that Hart-Scott-Rodino frees them from the requirements of Rule 6(e). Memorandum in Support of the Motion of the Commonwealth of Massachusetts and the States of Maine, New Hampshire, New Jersey, New York and Rhode Island to

Inspect and Copy Grand Jury Materials ("Petitioners' Memorandum") at 2-3 (filed Jan 12, 1981). Petitioners can find no support, however, in the legislative history of Section 4F(b). As understood by the Senate manager of the legislation, Senator Abourezk, Section 4F(b) "specifically limits the Attorney General's power to release documents to whatever his powers are under existing law." 122 Cong. Rec. 29160 (1976) (emphasis supplied).[12/] Under the existing law of Rule 6(e), the Attorney General could release grand jury documents only upon a showing before the District Court of compelling and particularized need. As Senator Abourezk put it, "Under existing law, [the Attorney General] cannot turn over materials given in response to a grand jury demand or to a civil investi-

gative demand." 122 Cong. Rec. 29160 (1976). According to the House Committee Report on Section 4F(b), the phrase "to the extent permitted by law," means that "the files are to be made available except where specifically prohibited." [1976] U.S. Code Cong. & Ad. News 2586. Again, Rule 6(e), Fed. R. Crim. P., as construed by the Supreme Court, imposed such specific prohibitions well before the adoption of Hart-Scott-Rodino (as it still does). See Procter & Gamble, supra.

Thus the legislative history of Section 4F(b) refutes petitioners' argument. In fact, based upon an exhaustive review of the record, the leading commentators on the legislative history of Hart-Scott-Rodino have concluded that, under Sections 4F(a) and

4F(b), the United States Attorney General is required

> to notify state attorneys general of Sherman Act violations that have potential as parens patriae actions and to provide them with investigative files and other materials, except for materials obtained through grand jury proceedings or CID's [Civil Investigative Demands], which may not be provided.

Hart-Scott-Rodino: An Analysis 30 (citations omitted; emphasis supplied).[13/] Indeed, the commentators also conclude that when the Justice Department argues, as it did in this proceeding, Tr. 12-14, 16-17, that a state may gain access to grand jury testimony under Section 4F(b), it adopts a view which is "in conflict with the legislative history[.]" Hart-Scott-Rodino: An Analysis 30 n. 193.

In their memoranda, the state attorneys general argue that "even before the enactment of Section 4F(b), the courts recognized that governmental agencies, including those which are not specifically charged with enforcing the antitrust laws, should be accorded a special status and given access to grand jury materials without a showing of 'particularized need.'" See Petitioners' Memorandum 9. Thus petitioners seem to suggest that even if the court were to disagree with their interpretation of Section 4F(b), they are relieved of the obligation to show a particularized need for the grand jury materials simply because they are "governmental agencies."

Having reviewed the authorities which petitioners have cited in support

of that argument, as well as other applicable principles of law, the court finds no basis for reaching the conclusion which petitioners propose. Indeed, in United States v. Sobotka, 623 F. 2d 764 (2d Cir. 1980), our Court of Appeals reversed a District Court's order that transcripts of grand jury testimony be disclosed to the Grievance Committee of the Windham County Judicial District, State of Connecticut, an entity which, the court found, was "an independent public body charged with the performance of a public duty in a wholly disinterested and impartial manner." Id. at 767, quoting Grievance Committee of Hartford County Bar v. Broder, 152 A. 292, 296, 112 Conn. 263 (Sup. Ct. Conn. 1930). Despite the Committee's public character and public duty, and the public interest

in its work, the court required that the Committee establish a particularized need for the grand jury materials. Id. at 768. Finding that the Committee had made "no showing of particularized need," the court denied the Committee's request for the grand jury transcripts. Id.

This court finds, in sum, that Section 4F(b) was not intended to contravene the existing law governing the disclosure of grand jury materials. The court recognizes, however, the division of authorities on this question. In particular, the courts of appeals for the Fourth and Ninth Circuits have both ruled that Section 4F(b) does eliminate the "compelling necessity" requirement when state attorneys general are seeking disclosure of federal grand jury files. See United States v. Colonial Chevrolet

Corp., 629 F. 2d 943 (4th Cir. 1980) ("Colonial Chevrolet"), and United States v. B.F. Goodrich Co., 619 F.2d 798 (9th Cir. 1980) ("B. F. Goodrich"). It must be noted, however, that in B.F. Goodrich, on which the Fourth Circuit subsequently relied in Colonial Chevrolet, supra, 629 F.2d at 947, 950, the Ninth Circuit found the legislative history of Section 4F(b) to be "equivocal," B.F. Goodrich, supra, 619 F.2d at 800, and concluded only that Section 4F(b) "impliedly directs" disclosure of grand jury materials, id. at 801.

This court respectfully disagrees with the notion that the legislative history of Section 4F(b) "impliedly directs" disclosure of grand jury materials. It finds in that history no

congressional direction, either explicit or implicit, to contravene the pre-existing law concerning disclosure of grand jury materials. Nevertheless, even if this court were to concur in the Ninth Circuit's characterization of the legislative history of Hart-Scott-Rodino, it could not follow that court's holding. In view of the clear language of Section 4F(b), this court could not rely on a legislative history that is, at best, "equivocal," or a Congressional mandate that is, at most, "implied," to overturn a policy that is as well-settled as that of grand jury secrecy. See Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 399 (1959) (The policy of grand jury secrecy is "older than our Nation itself"); In Re Biaggi, 478 F.2d 489, 491 (2d Cir. 1973) (Although a

grand jury witness may waive the protection of secrecy, "[i]t is a tradition of our law that proceedings before a grand jury shall generally remain secret").[14/]

Indeed, it is a well-settled principle of statutory construction, often stated by the Supreme Court, that a court may not rely on an ambiguous legislative history to contradict the plain language of a statute. Consumer Product Safety Commission v. GTE Sylvania, 447 U.S. 102, 108 (1980) ("[T]he starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive"). See Aaron v. Securities and Exchange Commission, 446 U.S. 680,

697 (1980) (In view of the language of the statute there being construed, "it would take a very clear expression in the legislative history of congressional intent to the contrary to justify the conclusion that the statute does not mean what it so plainly seems to say"). The court shall follow this "familiar canon of statutory construction," and give effect to the straightforward language of Section 4F(b). Consumer Product Safety Commission v. GTE Sylvania, supra, 447 U.S. at 108.

In heeding the explicit language of Section 4F(b), this court therefore adopts the approach followed by other district courts which, both before and after the Fourth and Ninth Circuits' opinions, have held that Hart-Scott-Rodino does not relieve state attorneys

general of the burden of demonstrating a compelling and particularized necessity for any grand jury materials they seek. See State of Illinois v. Widmar, [1980-81] Trade Cases (CCH) ¶ 63,771 (N.D. Ill. 1981); Little Rock School District v. Borden, Inc., [1979-2] Trade Cases (CCH) ¶ 62,809 (E.D. Ark. 1979); Matter of Grand Jury, 469 F. Supp. 666 (M.D. Pa. 1978). Contra, United States v. Cargo Gasoline Co., slip op. No. 79-124-Cr-JB (M.D. Fla. Jan. 29, 1981); In Re Montgomery Real Estate Antitrust Litigation, 452 F. Supp. 54 (D. Md. 1978).

Accordingly, this court shall require that the state attorneys general establish a compelling and particularized need for the grand jury materials they seek. The question is whether they

have met that burden. In Douglas Oil, supra, 441 U.S. at 222, the Supreme Court set out a three-part test for determining when the traditional secrecy of the grand jury may be broken. The court stated as follows:

> Parties seeking grand jury transcripts under Rule 6(e) must show that the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed.

Since the state attorneys general have not even attempted in their memoranda to establish either a compelling or a particularized need for the grand jury material, only a few points by the court are required. Two of the petitioning states -- Massachusetts and New Jersey -- are already involved in the consolidated pre-trial proceedings of

In Re Cuisinart Food Processor Antitrust Litigation. Other petitioning parties may become so involved. There is no reason to believe that denial of the grand jury material in the course of this independent civil proceeding will, in any way, cause them injustice in the other pending civil actions. The petitioners are free to seek, in the consolidated litigation and under the Federal Rules of Civil Procedure, the same grand jury material which they now claim under Rule 6(e), Fed. R. Crim. P., and Hart-Scott-Rodino. They are free to use the Federal Rules of Civil Procedure for all other appropriate and lawful discovery purposes. Thus a denial of access to the grand jury material in this proceeding does not necessarily eliminate the ability of those states to

pursue the same material, of substantially similar evidence, by other means.

With respect to the second part of the Supreme Court's test, there is substantial authority for the proposition that the public interest in secrecy is reduced, although not eliminated, once the criminal proceedings generated by the grand jury have been concluded. See Douglas Oil, supra, 441 U.S. at 222.[15/] This court considers it to be equally true, however, that when the same or substantially similar materials are available by other means, and when the consumer protection aims of Hart-Scott-Rodino are being pursued by the litigation of seven pending national consumer class actions, the states' need for disclosure is similarly reduced. See United States v. Moten, 582 F. 2d 654, 663 (2d

Cir. 1978) (A party's "need" for grand jury materials varies in proportion to the degree of access he has to other sources of the information he seeks). Accordingly, this court cannot conclude that the states' need for disclosure, at this time and in this action, outweighs even the presently reduced public interest in the secrecy of the grand jury proceedings.

Finally, the states have not attempted to particularize their disclosure requests in any way. Because they do not know precisely what evidence the grand jury received, they are, of course, limited in their ability to specify relevant materials. Nevertheless, they have indicated no willingness to tailor their requests according to either time or geographic location. Indeed, the essence

of petitioners' argument is that Section 4F(b) relieves them from having to tailor their requests in any significant way. In the absence of even a suggestion, either in their memoranda or at oral argument, as to a procedure for the court's determining whether the minimal relevance requirements of Section 4F(b) have been met, this court cannot conclude that the states' request has been particularized sufficiently to satisfy the rule of Douglas Oil, supra.[16/]

Having applied the principles of Douglas Oil, supra, to the circumstances of this case, the court concludes that the petitioners have failed, to this point, to make a showing of need -- and, especially, of a particularized need -- sufficient to warrant disclosure. The

motion by the state attorneys general is, therefore, denied.[17/]

In conclusion, the court must make two points. First, as the court indicated at the outset, the motion of the state attorneys general, and the court's ruling on it, are but a piece of a large and complex litigation. In ruling on the motion, the court has considered only one, relatively narrow, issue of law -- namely, whether Hart-Scott-Rodino, read in conjunction with Rule 6(e), Fed. R. Crim. P., compels disclosure of the materials which the grand jury compiled in the course of its investigation of Cuisinarts. The court and all counsel know that these grand jury materials are also the subject of discovery requests, made pursuant to the Federal Rules of Civil Procedure, in the

consolidated cases now pending before this court. In issuing this ruling, the court intimates no view concerning the discoverability of these grand jury materials pursuant to the Federal Rules of Civil Procedure. That is a separate issue that will be decided in due course.

Second, in denying disclosure of the grand jury materials, the court has held only that, until this point, the states have failed to make the requisite showing of a compelling and particularized need. The court recognizes, however, that as litigation proceeds, there may eventually be a basis for such a showing. Accordingly, this ruling is without prejudice to a renewed application for disclosure upon a showing of compelling and particularized need. So as not to render any such future application futile, the

Attorney General of the United States is directed to retain, until further order of this court, all materials which were subpoenaed or created by the grand jury in the course of its investigation of Cuisinarts.

It is so ordered.

S/Jose A. Cabranes

Jose A. Cabranes

United States District Judge

Dated at Hartford, Connecticut, this 8th day of June, 1981.

NOTES

1. The penalty for violating the Sherman Act was increased to a felony by Act of December 21, 1974, Pub.L.No. 93-528, §3; 88 Stat. 1708.

2. In determining an appropriate sentence in the circumstances of this case, the court considered two additional factors. First, the maximum fine which may be imposed for a corporation's violation of the Sherman Act is $1,000,000. See 15 U.S.C. § 1, as amended (1974). Second, in their written submission to the court, counsel for Cuisinarts represented to the court that a fine of $250,000 would be among the most severe ever imposed for a criminal violation of the Sherman Act. If the proposed fine of $250,000 were to be compared to all published antitrust felony fines, Cuisinarts argued, it would become apparent that "a fine of $250,000 would subject Cuisinarts to punishment greater than that imposed on almost 80 per cent of horizontal price fixing defendants." Memorandum of Defendant Cuisinarts, Inc. in Support of Plea agreement at 10 (filed Dec. 19, 1980). If that fine were to be compared to defendant's operating revenues, net income, total assets and net worth, Cuisinarts asserted, the fine would appear

to be even more severe. Id. at 11. The government did not contest these representations by the defendant.

3. The eight cases which, on January 16, 1981, were consolidated by order of the JPML are listed below. The dates on which those actions were first filed, and the courts from which they were transferred, are indicated in parentheses.

Joan Sacarob, et al. v. Cuisinarts, Inc. (D. Conn. Sept. 22, 1980)
Belle Linda Gayer, etc. v. Cuisinarts, Inc., et al., (S.D. Cal. Sept. 23, 1980)
Janet Webber Bahr, etc. v. Marshall Field & Co., Inc. (N.D. Ill. Sept. 30, 1980)
Gloria Ehrlich, etc. v. Crate & Barrel, Inc. (N.D. Ill. Sept. 30, 1980)
Renee Logan v. Cuisinarts, Inc. (D.Mass. Oct. 7, 1980)
Frederic Blum v. Cuisinarts, Inc. (D. Conn. Oct. 8, 1980)
Fred Cohn, et al. v. Cuisinarts, Inc., et al. (D. Conn. Oct. 8, 1980)
Basic Living Products, Inc., etc. v. Cuisinarts, Inc. (N.D. Cal. Oct. 20, 1980)

4. The four so-called "tag-along" cases, which were transferred to this court on March 11, 1981 are listed below. The dates on which those actions were first filed, and the courts from which they were

transferred, are indicated in parentheses.

Agnes Eisenberger v. Cuisinarts, Inc. (S.D.N.Y. Oct. 28, 1980)
Commonwealth of Massachusetts, et al. v. Cuisinarts, Inc. (D. Mass. Oct. 30, 1980)
Robert I. Harwood, etc. v. Federated Department Stores, Inc. (S.D.N.Y. Nov. 21, 1980)
Yvonne S. Archer v. Federated Department Stores, Inc. et al. (S.D.N.Y. Nov. 28, 1981)

5. See note 4, supra.

6. Although the corporate name of the respondent is Cuisinarts, Inc., the trade name of its food processor omits the final "s" ("Cuisinart"). The seven cases which include claims for the certification of a nationwide class of Cuisinarts' purchasers include the Archer, Blum, Cohn, Eisenberger, Harwood, Logan and Sacarob actions. See notes 3 and 4, supra.

7. On January 5, 1981, the state of Connecticut, by its Attorney General, filed the first of the motions which are under consideration in this proceeding. Subsequently, the Attorneys General of fourteen other states filed identical motions, along with, in most cases, identical supporting papers. These states, with the dates of their filings indicated in parentheses, include: North Carolina (Jan. 12, 1981);

Maine, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island (joint motion field on Jan. 12, 1981); Maryland (Jan. 20, 1981); Pennsylvania (Jan. 28, 1981); Colorado (Jan. 30, 1981); Vermont (Jan. 30., 1981); Virginia (Feb. 6, 1981); Wisconsin (Feb. 13, 1981); and Texas (Mar. 13, 1981). Because all of the states which appear as petitioners in this proceeding rely on the same statutory authority, and seek the same action by the court, the court shall, in this opinion, refer to their requests as a single Motion to Inspect and Copy Grand Jury Materials.

8. See note 7, supra.

9. Cuisinarts had first stated this argument in its memorandum in opposition to the motion of the state attorneys general, but it had not included an explicit challenge to the jurisdiction of the court in those papers. In particular, Cuisinarts had stated that if the court granted the states' motion, it would then seek certification, pursuant to 28 U.S.C. § 1292(b), of an interlocutory appeal. Because §1292(b) applies only to civil actions, any decision issued in connection with the criminal action would not be appealable under that provision. For that reason, Cuisinarts argued, the court should decline to hear the motion. Memorandum of Cuisinarts, Inc. in Opposition to Motion by

Attorneys General for Release of Grand Jury Documents at 2-3 (filed Feb. 13, 1981).

10. See Scher, Emerging Issues Under the Antitrust Improvements Act of 1976 ("Emerging Issues"), 77 Colum. L. Rev. 679, 709 (1977) ("The most troublesome problem related to manageability of consumer class actions has been the difficulty encountered in developing an efficient, but constitutionally sound, procedure for assessing and distributing treble damages to millions of class members").

11. The parties vigorously disagree in their interpretations of the phrase "investigative files or other materials." Petitioners rely on United States v. Colonial Chevrolet Corp., 629 F.2d 943, 946-47 (4th Cir. 1980), to argue that Congress intended the term "investigative files" to include grand jury materials and transcripts. See Memorandum in Support of the Motion of the Commonwealth of Massachusetts and the States of Maine, New Hampshire, New Jersey, New York and Rhode Island to Inspect and Copy Grand Jury Materials ("Petitioners' Memorandum") 7-8 (filed Jan. 12, 1981). Respondent Cuisinarts relies on Matter of Grand Jury, 469 F.Supp. 666, 671 (M.D. Pa. 1978), which states, without additional discussion, ". . . we do not read 'investigative files or other materials' as

including grand jury materials . . . " See Memorandum of Cuisinarts, Inc. in Opposition to Motion by Attorneys General for Release of Grand Jury Documents 16-17 (filed Feb. 13, 1981). The court has concluded that, even if this disputed phrase sweeps as broadly as petitioners assert, the other provisions of Section 4F(b) -- and, in particular, the term "to the extent permitted by law" -- impose on petitioners a burden of showing a compelling and particularized need for the grand jury materials. The court has further concluded that, in the circumstances of this litigation, petitioners have been unable to meet that burden. Accordingly, it is not necessary for the court to analyze, with specificity, the phrase "investigative files or other materials," or to resolve this particular dispute between the parties.

Although the court shall not attempt to resolve this dispute, one point must be made concerning the meaning of the phrase "investigative files and other materials." Relying on United States v. Colonial Chevrolet, 629 F.2d 943, 946-47 (4th Cir. 1980), petitioners suggest that grand jury documents are part of the Justice Department's "investigative files" simply because those documents are in the Justice Department's possession. Petitioners' Memorandum 7-8. Petitioners forget, however, that a

federal grand jury is an arm of the District Court, and thus of the judiciary, and not an agent of the Justice Department or of any other executive agency. It is the District Court which impanels, supervises, and discharges the grand jury. See Procter & Gamble, supra, 356 U.S. at 384-85 (Whittaker, J., concurring) ("[G]rand jury minutes and transcripts are not the property of the Government's Attorneys agents or investigators . . . . Instead those documents are records of the court"). See also State of Illinois v. Widmar, [1980-81] Trade Cases (CCH) Paragraph 63,771 (N.D. Ill. 1981). (Because grand jury materials are the property of the judicial branch, Section 4F(b) "applies only and exclusively to the investigative files and other materials acquired by and belonging to the executive branch, of which the Department of Justice is a member." Accordingly, "Section 4F(b) does not refer to what is strictly thought of as grand jury materials").

12. As floor manager of Hart-Scott-Rodino on behalf of the Senate Judiciary Committee, see United States v. Colonial Chevrolet, supra, 629 F.2d at 947, Senator Abourezk was uniquely qualified to interpret the various provisions of the statute. The remarks which he made in the course of floor debate provide insight into the meaning of

Section 4F(b), which was proposed by the House and described in the House Committee Report which is reprinted in [1976] U.S. Code Cong. & Ad. News at 2586. Senator Abourezk's remarks were made in response to the plausible argument by Senator Hruska that Section 4F(b) could turn the Department of Justice into a "massive document distribution center." See 122 Cong. Rec. 29144 (1976). The contrast between Senator Hruska's critique, id., and Senator Abourezk's response, see 122 Cong. Rec. 29160 (1976), suggests that the aims of Section 4F(b) are much less sweeping than petitioners assert. (Note that Section 4G of Hart-Scott-Rodino, 15 U.S.C. Section 15g, permits state governments to retain private attorneys to bring parens patriae actions).

MR. HRUSKA: I will point the Senator to two other changes to facilitate large recoveries and private attorneys' fees. First, newly added Section 4F(b), which was not part of the Senate bill passed on June 10 [1976,] authorizes state officials and retained private attorneys to request "any investigative files or other materials which are or may be relevant or material to the actual

or potential cause of action" available to a State, whenever the Attorney General of the United States has brought an antitrust action which may affect the States.

For example, in large antitrust cases charging nationwide activities by national corporations, all affected States would be notified by the Department of Justice.

Under this provision, State officials and retained private attorneys would be entitled to demand truckloads of investigative materials, which conceivably might be relevant not only to an actual but even to a "potential cause of action."

For example, in the typical big antitrust case, such as the IBM monopoly case, literally millions of documents may be relevant or material to an antitrust cause of action. The Justice Department could thus become a massive document distribution center for the benefit

of State officials and of the enterprising private antitrust attorneys interested in developing a parens patriae lawsuit out of the Justice Department's investigative files.

* * * * *

MR. ABOUREZK: Also, Senator Hruska has raised objection to Section 4F(b) of the Byrd motion . . . .[Text of Section 4F(b) omitted].

This section specifically limits the Attorney General's power to release documents to whatever his powers are under existing law. Under existing law, he cannot turn over materials given in response to a grand jury demand or to a civil investigative demand. Therefore, the section is limited by existing law to cases were materials were turned over voluntarily. This section is in the bill because it was requested by the members of the House conferees [sic] who had met on this.

122 Cong. Rec. 29144, 29160 (1976). Senator Abourezk provided an authoritative Senate view of the provision proposed by the House. The intention of the legislators most closely connected to this provision was not in any sense "equivocal." See page 19, infra; contra, United States v. B. F. Goodrich Co., 619 F.2d 798, 800 (9th Cir. 1980).

13. In the Antitrust Civil Process Act of 1962 ("1962 Act"), 15 U.S.C. §§ 1311-14, Congress had authorized the Justice Department to issue civil investigative demands ("CID's") as part of its investigations of possiile antitrust violations. Pursuant to such CID's, Justice Department investigators were permitted to acquire documentary material relatlating to those investigations. The 1962 Act included, however, extensive guidelines for preserving the confidentiality of those materials. See 15 U.S.C. § 1313 (1962). In 1976, Hart-Scott-Rodino amended the 1962 Act to permit (1) the issuance of CID's to third-parties, as well as to persons suspected of antitrust violations, see 15 U.S.C. § 1312(a), as amended (1976), and (2) the submission of written interrogatories by, and the taking of oral depositions from, persons to whom CID's have been issued, id.

Hart-Scott-Rodino in no way modified the procedures of the 1962 Act for preserving the confidentiality of CID materials. Indeed, Hart-Scott-Rodino extended those procedures to protect the kinds of oral and written materials which it was, in other provisions, authorizing the Justice Department to collect. Thus under federal antitrust law, as it existed before Hart-Scott-Rodino and as it now exists, the Justice Department bears a duty to maintain the confidentiality of CID materials. The Assistant Attorney General in charge of the Antitrust Division is required to designate an antitrust investigator to serve as "custodian of documentary material, answers to interrogatories, and transcripts of oral testimony," 15 U.S.C. § 1313 (a). The custodian is to "take physical possession" of the CID material, 15 U.S.C. § 1313(c) (1), and while it is "in the possession of the custodian, no . . . material . . . so produced shall be available for examination, without the consent of the person who produced such material . . .and, in the case of any product of discovery produced pursuant to an express demand for such material, of the person from whom the discovery was obtained, by any individual other than a duly authorized official, employee, or agent of the Department of Justice," 15 U.S.C. § 1313(c) (3). The custodian may provide the CID materials to a Justice Depart-

ment attorney for use "before any court, grand jury, or Federal administrative or regulatory agency in any case or proceedings," 15 U.S.C. §1313(d)(1). "Upon the completion of any such case, grand jury, or proceeding," however, "such attorney shall return to the custodian any such material, answers or transcripts so delivered which have not passed into the control of such court, grand jury, or agency, through introduction thereof into the record of such case or proceeding," Id. (emphasis supplied) After the completion of any case or proceeding arising from the investigation for which the CID material had been produced, or after the passing of a reasonable period of time in which no case or proceeding has been commenced, the custodian is required, upon written request of the person who produced the material, to return the material to that person. See U.S.C. § 1313(e). There are only two limitations on this requirement. First, the Justice Department may make copies of the CID documents. See 15 U.S.C. § 1313(c)(2). Second, the custodian may return only that material "which has not passed into the control of any court, grand jury or agency through the introduction thereof into the record of such case or proceeding," 15 U.S.C. § 1313(e).

An analysis of these provisions, and especially of 15 U.S.C. §1313 (d)-(e), provides a further basis for rejecting petitioner's interpretation of Section 4F(b). To begin, it is clear that CID materials that are not put before a grand jury are not subject to disclosure requests by state attorneys general. Section § 1313(c) so provides. The Justice Department so stated at oral argument. Tr. 9. The commentators concur. See Emerging Issues 692 ("The absolute nature of the confidentiality protection afforded under [§ 1313] should operate to limit the scope of [S]ection 4F(b) . . . . Although [§ 1313(d)(1)] does permit use of CID material in connection with court proceedings, this applies only if 'any attorney of the Department of Justice has been designated to appear' before the court, and thus does not include a state attorney general engaged in a parens patriae investigation or suit"). This fact, alone, suggests that Congress did not intend that grand jury materials be released. In both the 1962 Act and Hart-Scott-Rodino, Congress made clear that the investigative materials collected by the Justice Department should remain confidential. Petitioners offer no principled basis for believing that grand jury materials should be treated with less of a concern for confidentiality than is required for CID's. In the relevant stautory provisions, Congress never indicates

any intention of treating grand jury materials with a lower degree of confidentiality. Indeed, the fact that Congress did not establish specific guidelines for the secrecy of grand jury materials may have resulted from its belief that the pre-existing Rule 6(e), Fed. R. Crim. P., had settled that issue of law sufficiently. Thus the legislative scheme which Congress created to protect CID materials from disclosure suggests how Congress intended that grand jury materials be preserved.

In the present case, however, much of the CID materials which had been collected by the Justice Department was also introduced before the grand jury. At oral argument, the Justice Department represented that it had acquired no more than 50,000 documents as a result of its investigation of Cuisinarts. Tr. 7. Of these, approximately 26,000 documents had been produced by Cuisinarts pursuant to grand jury subpoenas. Tr. 6-7. At the same time, the Justice Department represented that there was "substantial overlap" between those documents which had been produced pursuant to CID's and those which had been produced pursuant to grand jury subpoenas. Tr. 8-9. It would appear that those documents which were first produced pursuant to a CID and later presented to the grand jury are subject to the strict

confidentiality requirements of 15 U.S.C. § 1313, and thus, under § 1313(c), are available to Justice Department personnel only. Because a "substantial" number of the grand jury documents which the states now seek were, in fact, first produced pursuant to a CID, the states' disclosure request would appear to be barred, to that extent, by the terms of 15 U.S.C. § 1313.

It might be argued that a CID document loses its protections under § 1313 once it is produced to a grand jury. See, e.g., Tr. 9-15 (oral argument of attorney for United States). Such an argument would have to be rejected, however, for two reasons. First, even if the protections of § 1313 were removed as soon as the material had been produced to the grand jury, the protections of Rule 6(e), Fed. R. Crim. P., which are at least as stringent, would attach to those materials at the moment that they first came before the grand jury. Second, in both §§ 1313(d) and 1313(e), Congress recognized the well-settled principle that materials introduced to the grand jury enter the control, and become part of the record, of the court. See Procter & Gamble, supra, 356 U.S. at 684-85 (Whittaker, J., concurring). Indeed, in §1313(d)(1) Congress provided that material which has "passed into the control" of a grand jury, "though the introduction

thereof into the record" of a proceeding, may not be returned to the Justice Department custodian. In § 1313(e), it provided that such grand jury material may not be returned to the person who produced it. Thus in § 1313, Congress appeared to place grand jury material outside the control of the Justice Department. If that is the case, there must be a serious question whether the Justice Department would have the power, under Section 4F(b), to provide the grand jury materials requested by the states. Cf. State of Illinois v. Widmar, [1980-81] Trade Cases (CCH) ¶ 63,771 (N.D. Ill. 1981).

14. In In re Biaggi, 478 F.2d 489, 491 (2d Cir. 1973), our Court of Appeals summarized some of the policy considerations which underlie this tradition of grand jury secrecy.

> The tradition rests on a number of interests--the interest of the government against disclosure of its investigation of crime which may forewarn the intended objects of its inquiry or inhibit future witnesses from speaking freely; the interest of a witness against the disclosure of testimony of others which he has had no opportunity to cross-examine or rebut, or of his own testimony on matters which may be irrelevant or where he may have been

subjected to prosecutorial brow-beating without the protection of counsel; the similar interest of other persons who may have been unfavorably mentioned by grand jury witnesses or in questions of the prosecutor; protection of witnesses against reprisal; and the interests and protection of the grand jurors themselves.

15. In United States v. Sobotka, 623 F.2d 764 (2d Cir. 1980), our Court of Appeals drew on Douglas Oil, supra, 441 U.S. at 222-23, to hold that, where grand jury proceedings had been concluded and where the party seeking disclosure of the grand jury's documents was a public body, the burden on that party of showing a compelling necessity for the documents was reduced. United States v. Sobotka, supra, 623 F.2d at 767. "Nonetheless," the court stated, "some necessity need be shown by the party seeking disclosure." Id. In particular, the court held that "the showing of need must be made 'with particularity' so that 'the secrecy of the proceedings [may be] lifted discretely and limitedly." Id. at 768, quoting United States v. Procter & Gamble Co., 356 U.S. 677, 682-83 (1958). It is precisely such a showing of particularized need which the petitioners in this proceeding have declined to attempt.

16. In their memoranda, petitioners specifically contend that they are not required either to particularize their need for grand jury materials or to narrow the scope of their request. See Petitioners' Memorandum at 11. At oral argument, petitioners similarly refused to particularize their request for the grand jury documents. The following colloquy between the court and counsel for petitioners illustrates petitioners' position.

THE COURT: Let me ask you whether your argument isn't something like a bootstrap argument; namely, that if the Grand Jury received something in evidence, if the Grand Jury had it, it must be relevant to every state's possible claim; isn't that really what you are saying?

Isn't your claim here really that if the Grand Jury had it, it's relevant, it's got to be relevant; that's why you want it all?

MR. KOVACS: I think that absent knowledge about what was produced to the Grand Jury, it's a very difficult question to answer. Documents might

be subpoenaed that, in fact, might not have relationship to an unlawful antitrust violation. For instance, financials --

THE COURT: Hold on a second.

So you wouldn't be able to answer the question of relevance, you're saying, until, in effect, you've gotten it all? You can't make a judgment about relevance?

MR. KOVACS: That's correct. An example would be --

THE COURT: So, in fact, your argument is that in allcases of this sort, the parens patriae litigants really are entitled to everything?

MR. KOVACS: That's correct.

THE COURT: Without a showing of relevance at the threshold? Inasmuch as --

MR. KOVACS: I think what we would argue is that there must be a presumption of relevance attached as a result of the fact that the subpoena for those

documents was issued, so that some attorney, and with supervision by the appropriate authorities in the Department of Justice, made a decision that those documents requested and that testimony taken bore some relevance to the alleged violation.

THE COURT: So that's the argument that I suggested: If the Grand Jury had it, its relevant?

MR. KOVACS: I think correct, yes; that is correct.

On the otherhand, however, I know in our investigations we might ask for a balance sheet. While that might not be relevant to the evidence of the unlawful agreement, it might be relevant to damages. But I think it goes farther out, as far as its relevance is concerned.

Tr. 44-46.

17. There is some authority for holding that the policy of grand jury secrecy has a more limited application to subpoenaed documents than it

does to transcripts of grand jury testimony and proceedings. See for example State of Illinois v. Sarbaugh, 552 F.2d 768, 772 n.2 (7th Cir. 1977), cert. denied sub nom. J.L. Simmons Co. v. Illinois, 434 U.S. 889 (1977), citing United States v. Interstate Dress Carriers, Inc., 280 F.2d 52, 54 (2d Cir. 1960). At oral argument, counsel for both the United States and for respondent Cuisinarts argued that the court should give identical treatment to subpoenaed documents and to transcripts of proceedings. Tr. 11, 57. (They disagreed, however, on the question of what sort of treatment that should be). Similarly, petitioners have never urged that the court adopt a distinction between subpoenaed documents and grand jury transcripts. Having considered the views of counsel, and having reviewed the case law concerning grand jury secrecy, the court has found no convincing reason to apply different standards, or to accord different treatment, to subpoenaed documents and to transcripts of grand jury proceedings in this case. See Matter of Grand Jury, 469 F. Supp. 666, 671 (M.D. Pa. 1978). In view of the court's denial of petitioners' motion, therefore, the petitioners shall not, at this time be entitled either to documents subpoenaed by the grand jury, or to transcripts of proceedings conducted by the grand jury.

Opposition

Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS
CLERK

No. 81-1595

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF CONNECTICUT, *et al.*,

Petitioners,

against

CUISINARTS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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Question Presented

Whether §4F(b) of the Clayton Act, 15 U.S.C. §15f(b), which contains no such permissive language, nonetheless authorizes release of secret federal grand jury materials to state attorneys general who have not demonstrated any need, much less the compelling and particularized need required by Rule 6(e) of the Federal Rules of Criminal Procedure.

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In the
SUPREME COURT OF THE UNITED STATES
October Term, 1981

No. 81-1595

STATE OF CONNECTICUT, *et al.*,

Petitioners,

against

CUISINARTS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

Opinions Below

The opinion of the court of appeals (Pet. App. A1-A55) is reported at 665 F.2d 24. The opinion of the district court (Pet. App. D1-D75) is reported at 516 F.Supp. 1008.

Jurisdiction

The judgment of the court of appeals was entered November 19, 1981. The petition for a writ of certiorari was filed February 17, 1982. This Court's jurisdiction is invoked under 28 U.S.C. §1254.

Statute and Rule Involved

Section 4F(b) of the Clayton Act, 15 U.S.C. §15f(b), provides:

> To assist a State attorney general in evaluating the notice or in bringing any action under this Act, the Attorney Gen-

eral of the United States shall, upon request by such State attorney general, make available to him, to the extent permitted by law, any investigative files or other materials which are or may be relevant or material to the actual or potential causes of action under this Act.

Rule 6(e) of the Federal Rules of Criminal Procedure provides, in pertinent part:

(e) Recording and Disclosure of Proceedings.

. . . .

(2) General Rule of Secrecy. A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. . . .

(3) Exceptions. . . .

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made —

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding.

. . . .

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

Statement of the Case

On September 17, 1980, the United States filed an indictment in the United States District Court for the District of Connecticut charging respondent and unnamed alleged co-conspirators with fixing, stabilizing, and maintaining the retail price of Cuisinart brand food processors between 1974 and 1979 in viola-

tion of §1 of the Sherman Act, 15 U.S.C. §1. On the same day, the United States filed a companion civil complaint, based upon the same allegations, naming respondent as defendant and seeking injunctive relief (Pet. App. D4-D5).

The grand jury which returned the indictment had subpoenaed approximately 26,000 documents from respondent (Pet. App. D68). Substantially all of these 26,000 documents had previously been obtained from respondent by the United States Department of Justice pursuant to a Civil Investigative Demand, 15 U.S.C. §§1311-14 (*ibid.*). The grand jury also subpoenaed or examined third-party documents and transcripts of testimony previously taken pursuant to Civil Investigative Demands and heard testimony from twenty-three witnesses (Pet. App. A14).

In the wake of the indictment, numerous private plaintiffs filed purported class actions against respondent and others seeking relief under the antitrust laws. Among these actions were two parens patriae actions commenced by petitioners Massachusetts and New Jersey. When Massachusetts and New Jersey filed their complaints, they simultaneously served respondent with very substantial discovery demands pursuant to Rules 33 and 34 of the Federal Rules of Civil Procedure (Pet. App. A50). In addition, petitioners Connecticut, Maryland, and North Carolina addressed investigative demands to respondent under authority of their respective state statutes (*ibid.*) and respondent has complied therewith.

Commencing January 5, 1981 and continuing through March 13, 1981, petitioners moved the district court for an order allowing them to inspect and copy all grand jury materials, including transcripts, documents, and exhibits gathered or generated pursuant to the investigation of the grand jury which resulted in the indictment of respondent (Pet. App. D16). Petitioners purported to move under Fed.R.Crim.P. 6(e), but in fact based their motion upon the claim that Clayton Act §4F(b) entitled them to access to grand jury materials as of right. Petitioners accordingly declined to demonstrate any need for access to the grand jury materials they were seeking. (Pet. App. D46, D72).

The district court denied petitioners' motion in all respects "without prejudice to a renewed application for disclosure upon a showing of compelling and particularized need" as mandated by Fed.R.Crim.P. 6(e) (Pet. App. D52). The district court first observed the "general rule" that "matters occurring before the grand jury" are secret, and shall not be disclosed, except as permitted by Fed.R.Crim.P. 6(e)(3). Since petitioners sought disclosure under that Rule, established case law, the court found, required them to demonstrate a compelling and particularized need for disclosure so that the court could properly exercise its discretion to determine whether the need for grand jury materials outweighs the interest in secrecy (Pet. App. D24-D25). The district court held that Clayton Act §4F(b) does not eliminate the traditional requirement to show compelling and particularized need for disclosure of grand jury materials. Moreover, the district court ruled, contrary to petitioners' argument, that the legislative history of §4F(b) demonstrates it was intended to solve discrete problems which had theretofore limited the effectiveness of consumer antitrust class actions and was not addressed to perceived problems in the discovery process (Pet. App. D27-D33).

The district court, assuming, without deciding, that the statutory phrase "investigative files or other materials" includes grand jury materials, determined that §4F(b) authorizes disclosure of such materials only "to the extent permitted by law" (Pet. App. D33-D35)—*i.e.*, the "law" as reflected in Fed.R.Crim.P. 6(e) and the controlling cases decided by this Court thereunder. The district court found clear support for this reading in the pertinent legislative history of both the Senate and the House of Representatives (Pet. App. D35-D36).

The district court was cognizant of two contrary court of appeals decisions, *United States* v. *B.F. Goodrich Co.*, 619 F.2d 798 (9th Cir. 1980) and *United States* v. *Colonial Chevrolet Corp.*, 629 F.2d 943 (4th Cir. 1980), *cert. denied*, 450 U.S. 913 (1981), but declined to follow them. The court concluded that the Fourth and Ninth Circuits had disregarded the clear language of §4F(b) and relied upon legislative history which, in those

courts' own view, is "equivocal" and only "impliedly" overrules the extremely well-settled policy of grand jury secrecy (Pet. App. D40-D43).

Finally, although petitioners made no attempt to address the issue, the district court found that no compelling and particularized need for access to grand jury materials exists at the present time. Among other things, the district court found that petitioners Massachusetts and New Jersey, as parens patriae plaintiffs, are free to seek all relevant evidence under the discovery provisions of the Federal Rules of Civil Procedure (Pet. App. D46-D47). Moreover, the district court noted that petitioners had made no effort to particularize their request for access to grand jury materials and thus failed to provide the court with any basis for determining whether even the "minimal relevance requirements" of §4F(b) had been met (Pet. App. D49-D50).

The United States Court of Appeals for the Second Circuit (Irving R. Kaufman, J.) unanimously affirmed. The court of appeals first held that the phrase "investigative files or other materials" excludes grand jury materials in the possession of the Department of Justice. The court declared that since grand jury materials "remain the records of the courts, and courts must decide whether they should be made public," it would be "curious logic indeed" to find such materials to be part of the Department of Justice's files (Pet. App. A23-A24). Since the policy of grand jury secrecy is "older than our nation itself," *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 399 (1959), the court of appeals found it impossible to conclude that Congress intended the generalized terminology "investigative files or other materials" to embrace grand jury materials "without thoroughly debating the issue and without making specific provision for it" (Pet. App. A25-A26).

Further, the court of appeals, following "well-settled principles of statutory construction" and beginning with the statutory language itself, *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980), found §4F(b)'s limiting language, "to the extent permitted by law," dispositive (Pet.

App. A26-A27). The court explained that Fed.R.Crim.P. 6(e)(2), as consistently interpreted by this Court, mandates a compelling showing of particularized need before access to secret grand jury materials may be granted. *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 222 & n.12 (1979); *Dennis* v. *United States*, 384 U.S. 855, 872 (1966); *Pittsburgh Plate Glass Co.* v. *United States, supra*, 360 U.S. at 400; *United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 683 (1958) (Pet. App. A28-A29). This rule, the court of appeals observed, is premised upon the overriding policy of protecting the integrity of the grand jury process, safeguarding against possible retaliation directed at witnesses, protecting the innocent, and encouraging free testimony (Pet. App. A29-A30).

The court of appeals considered and specifically rejected petitioners' contention that Clayton Act §4F(b) overrules the traditional standards of Fed.R.Crim.P. 6(e) and the controlling decisions of this Court thereunder (Pet. App. A33). The court deemed it significant that Congress, aware of that Rule and those decisions, gave no statutory indication that it intended to create a new, lesser standard for disclosure to state attorneys general. Moreover, the court was "confident that if Congress had intended that district courts should no longer consider requests by state attorneys general to be governed by the particularized need standard, it would have made its intention crystal clear in light of its awareness of the issue" (Pet. App. A34-A35).

Finally, the court of appeals joined the Seventh Circuit[1] in expressly rejecting petitioners' contention that they somehow occupy a "preferred" position in the scheme of private federal antitrust enforcement (Pet. App. A38-A39). The court of appeals expressly endorsed the district court's reasoning that while the Hart-Scott-Rodino Antitrust Improvements Act, of which §4F(b) is a part, accomplishes certain narrow remedial goals in antitrust enforcement which augment the role of state attorneys general, there is nothing in the Act's language or legislative history

[1] *In re State of Illinois Petition to Inspect and Copy Grand Jury Materials*, 659 F.2d 800 (7th Cir.), *petition for cert. filed sub nom. Illinois* v. *Abbott & Associates, Inc.*, No. 81-1114 (Dec. 15, 1981).

to suggest that Congress intended to or did alter the existing standard of grand jury secrecy—a decision reinforced by numerous court decisions holding that public entities must meet the same disclosure standard of particularized need as private parties (Pet. App. A39-A45).

Reasons for Denying the Writ

I

Supreme Court review is unnecessary because the question presented is in the process of being settled by the Courts of Appeals.

Four courts of appeals have had occasion to consider whether, as petitioners contend, §4F(b) creates an implied exception to traditional Fed.R.Crim.P. 6(e) grand jury secrecy principles.

Two early cases gave the issue only passing consideration before concluding, as petitioners urge, that §4F(b) authorizes disclosure of federal grand jury materials to state attorneys general without any showing of compelling and particularized need. Both of these opinions acknowledged the controlling standards of Fed. R.Crim.P. 6(e) but, in acts of judicial legislation, inexplicably discarded them in order to implement perceived policy goals found nowhere in the language or legislative history of §4F(b).

Thus, the Ninth Circuit's per curiam opinion in *United States* v. *B.F. Goodrich Co., supra,* 619 F.2d 798, felt compelled to acknowledge that "[t]he legislative history is equivocal." 619 F.2d at 800. Nonetheless, that court appears to have based its decision to permit release of grand jury materials to the states upon what it perceived to be public policy reasons, *i.e.*, the "favored" role of state attorneys general in antitrust enforcement. The court reached well beyond the four corners of §4F(b) which, in the court's own words, only "impliedly directs" disclosure of grand jury materials to the states without the showing

of "particularized and compelling need which is *normally required* by Rule 6(e)." 619 F.2d at 801 (emphasis added).

The Fourth Circuit's opinion in *United States* v. *Colonial Chevrolet Corp., supra,* 629 F.2d 943, relies heavily upon *Goodrich* and is bottomed upon substantially the same perceived public policy rationale. The court ignored the traditional principles of judicial supervision of grand jury proceedings and incorrectly concluded that grand jury materials are within the "investigative files" of the United States Attorney General simply because "[t]he use of grand jury proceedings as an 'investigative' instrument in antitrust enforcement is well recognized." 629 F.2d at 947 (footnote omitted).

The court believed that under §4F(b) a state attorney general would still be required to obtain a court order under Fed.R. Crim.P. 6(e), but found the standards of Rule 6(e) inapplicable, erroneously concluding that §4F(b) eliminated the requirement for showing compelling and particularized need, notwithstanding the absence of any legislative support for such a conclusion. 629 F.2d at 947-48, 950.

Not only are the rulings in *Goodrich* and *Colonial Chevrolet* based entirely on inference, but their holdings are internally inconsistent. Since the Fourth and Ninth Circuits granted the states access to grand jury materials under Rule 6(e), they obviously concluded that an order of the court pursuant to Rule 6(e) is necessary before disclosure may be allowed. However, they simultaneously exempted the states from the traditional Rule 6(e) standards by leaping to the conclusion that §4F(b) somehow does away with those standards, thus effectively leaving to the states' discretion the ultimate issue of access.

In marked contrast to the foregoing opinions are the carefully reasoned and exhaustive opinions of the court below and the Seventh Circuit in *In re State of Illinois Petition, supra,* 659 F.2d 800. Both the Second and Seventh Circuits had the benefit of the earlier Fourth and Ninth Circuit decisions but, after examining in detail the traditional role of grand jury secrecy, this

Court's applicable holdings, the statutory language, and the legislative history, expressly declined to give §4F(b) the same expansive and unwarranted reading.[2]

In sum, after initial cursory treatment by the Fourth and Ninth Circuits, the question presented by petitioners has been answered by the Second and Seventh Circuits based upon careful and, we submit, entirely correct analysis. The issue of law proffered for review is, accordingly, in the process of settling. Two circuits will soon consider these issues[3] and, in light of the forcefulness of the opinion below and that of the Seventh Circuit, it is reasonable to expect that their interpretation of §4F(b) will be followed.

Under these circumstances, there is no purpose to be served by Supreme Court review of the decision below at this time. As Justice Frankfurter observed:

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[2]The opinion below is discussed in detail *supra* at 5-7.

In *In re State of Illinois Petition, supra,* 659 F.2d 800, the Seventh Circuit, like the Second Circuit, found grand jury materials to be outside the scope of the generalized phrase "investigative files or other materials" because those materials are not prosecutorial records, but rather court records. 659 F.2d at 802-03. Further, the Seventh Circuit ruled that the language of §4F(b), "to the extent permitted by law," incorporates the particularized need standard of Fed.R.Crim.P. 6(e) without any exception for state attorneys general:

> We are certain that if Congress intended to create the change that the petitioner suggests, it would have said so. It is simply impossible to believe that the "indispensable secrecy of grand jury proceedings," [*United States* v.] *Procter & Gamble* [*Co.*], 356 U.S. at 682, 78 S.Ct. 983, 985, 2 L.Ed.2d 1077 (citation omitted), would have been altered by Congress *sub silentio.*

659 F.2d at 805. Finally, the Seventh Circuit quoted at length from the district court opinion in this case as support for the conclusion that the legislative history of the Hart-Scott-Rodino Act simply fails to support the expansive reading of §4F(b) urged by petitioners in that case and at bar. 659 F.2d at 806-08, *citing In re Grand Jury Investigation of Cuisinarts, Inc.,* 516 F. Supp. 1008 (D. Conn. 1981).

[3]*In re Grand Jury Proceedings, appeal docketed,* No. 81-1059 (5th Cir. Feb. 10, 1981); *Arizona* v. *United Dairymen of Arizona, appeal docketed,* No. 81-5643 (9th Cir. July 29, 1981), in which the Ninth Circuit will have an opportunity to reconsider its decision in *Goodrich* in light of the more recent opinions of the Second and Seventh Circuits.

> A decision may satisfy all [the] technical requirements [for the grant of a writ of certiorari] and yet may commend itself for review to fewer than four members of the Court. Pertinent considerations of judicial policy here come into play. A case may raise an important question but the record may be cloudy. It may be desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening.

Maryland v. *Baltimore Radio Show, Inc.*, 338 U.S. 912, 918 (1950) (opinion respecting denial of petition for writ of certiorari).

Justice Harlan expressed a similar admonition concerning exercise of the discretionary power to grant certiorari. "[E]ven where a 'true' conflict may be said to exist, certiorari will sometimes be denied where it seems likely that the conflict may be resolved as a result of future cases in the Court of Appeals . . . ." Harlan, *Some Aspects of the Judicial Process in the Supreme Court of the United States*, 33 Australian L.J. 108, 112 (1959). Moreover, the existence of a conflict between two or more courts of appeals by itself does not require this Court to exercise its discretion to grant a writ of certiorari. *See Michael* v. *United States*, ____ U.S. ____, 70 L.Ed.2d 257 (1981) (dissent from denial of petition for writ of certiorari in the face of a clear conflict among First, Fifth, and Sixth Circuits); *Kimble* v. *D.J. McDuffy, Inc.*, ____ U.S. ____, 70 L.Ed.2d 651, 652 (1981) (same; conflict among Third, Fifth, Eighth, and District of Columbia Circuits on issue of statutory construction); *Kamberos* v. *GTE Automatic Electric, Inc.*, ____ U.S. ____, 70 L.Ed.2d 599, 600 (1981) (same; conflict among Fifth, Seventh, and Ninth Circuits); *Green* v. *United States*, 451 U.S. 929 (1981) (same; conflict among Fourth, Fifth, Eighth, and Tenth Circuits).

Respondent respectfully submits that the trend of the evolving case law concerning the issue for which review is sought clearly points toward a settling of the law in harmony with the opinion below. For this reason, the writ should be denied.

II

The case is not ripe for review because the decision below was interlocutory in nature.

As noted, the district court denied petitioners' application "without prejudice to a renewed application for disclosure upon a showing of compelling and particularized need" (Pet. App. D52). Moreover, the district court acknowledged the availability to certain petitioners of the full panoply of discovery devices under the Federal Rules of Civil Procedure in their parens patriae actions against respondent (Pet. App. D46-D47). Thus, petitioners are by no means foreclosed from obtaining access to grand jury materials. To the contrary (and perhaps indicative of their lack of genuine interest in and need for such materials), petitioners have elected to pursue the instant appeal in lieu of presenting the district court with any showing of compelling and particularized need.

Respondent respectfully submits that until petitioners have exhausted the avenues left open to them by the district court, it would be premature at the very least for this Court to grant the present petition for review, and that such review, if any, should abide the outcome of petitioners' other attempts, if any, to secure the materials they seek.

III

The writ should be granted in this case if one is granted in Illinois v. Abbott & Associates, Inc., No. 81-1114.

On December 15, 1981, a petition for a writ of certiorari was filed in this Court in *Illinois* v. *Abbott & Associates, Inc.*, No. 81-1114, seeking review of the Seventh Circuit's decision in *In re State of Illinois Petition, supra.*

Should the Court grant a writ of certiorari in that case, it is essential that a writ likewise be granted in the case at bar. The legal questions as to the meaning and intent of §4F(b) presented

in the two cases are essentially identical. As a practical matter, it would constitute a denial of respondent's due process rights to deny the writ here while granting it in *Illinois* v. *Abbott & Associates,* since such a result would lead to an adjudication affecting respondent's substantive rights absent notice and opportunity to be heard.[4]

Equally important, the record in the case at bar presents a state of facts apparently not present in the record in *Illinois* v. *Abbott & Associates,* but which are likely to recur in future cases involving application of §4F(b). Specifically, the record at bar demonstrates that the documents subpoenaed from respondent by the grand jury, numbering some 26,000, were substantially those documents previously obtained by the United States Department of Justice pursuant to Civil Investigative Demand (15 U.S.C. §§1311-14) (Pet. App. D68). As the district court found, the Antitrust Civil Process Act embodies "extensive guidelines for preserving the confidentiality of those materials" (Pet. App. D64) and petitioners' "disclosure request would appear to be barred," irrespective of the court's interpretation of Clayton Act §4F(b), by the confidentiality mandate of 15 U.S.C. §1313 (Pet. App. D69).

In view of the widespread utilization of Civil Investigative Demands by the Department of Justice, this Court, if it determines to review the issues pressed by petitioners, should have before it the undisputed record facts of this case so that it may consider the relationship between §4F(b) and 15 U.S.C. §1313. For reasons such as these, it is a recognized practice of this Court simultaneously to review two or more contemporaneous cases embodying the same or similar issues of law. *See, e.g., Furman*

[4]This conclusion flows from the unusual procedural context of this litigation. The district court denied petitioners' motion "without prejudice to a renewed application for disclosure [of grand jury materials] upon a showing of compelling and particularized need" (Pet. App. D52). Thus, should this Court deny the writ in the case at bar, grant it in *Illinois* v. *Abbott & Associates,* and reverse the judgment of the Seventh Circuit, respondent here will have suffered an effective reversal as well, since the customary benefit of the final judgment rule would not bar petitioners in this case from obtaining the relief they seek by renewed application to the district court.

v. *Georgia*, 408 U.S. 238 (1972); *Brown* v. *Board of Education* (with *Bolling* v. *Sharpe* and *Gebhart* v. *Belton* on certiorari), 349 U.S. 294 (1955); *Sunal* v. *Large* (with *Alexander* v. *United States* on certiorari), 332 U.S. 174 (1947); *United States* v. *Silk* (with *Harrison* v. *Greyvan Lines, Inc.* on certiorari), 331 U.S. 704 (1947).

Conclusion

The petition for a writ of certiorari should be denied. Alternatively, if the petition for a writ of certiorari is granted in No. 81-1114, the petition at bar should also be granted.

Respectfully submitted,

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Dated: March 22, 1982

Statement Pursuant to Rule 28.1

Respondent has no parent companies and no subsidiaries. Respondent has no affiliates, other than corporations whose stock is owned by the same individuals who own the stock of Respondent, except for Cuisinarts Research and Development, Inc.

Brief for the United States

Supreme Court, U.S.
FILED
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No. 81-1595

In the Supreme Court of the United States

OCTOBER TERM, 1981

IN RE: GRAND JURY INVESTIGATION OF CUISINARTS, INC.
STATE OF CONNECTICUT, ET AL., PETITIONERS

v.

CUISINARTS, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether grand jury transcripts and subpoenaed exhibits in the files of prosecutors who conducted a grand jury investigation are "investigative files or other materials" within the meaning of Section 4F(b) of the Clayton Act, 15 U.S.C. 15f(b).

2. Whether Section 4F(b) authorizes disclosure to state attorneys general of grand jury materials relating to antitrust investigations on less of a showing than particularized and compelling need.

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MEMORANDUM FOR THE UNITED STATES

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1. On September 17, 1980, a grand jury indicted Cuisinarts for conspiring to fix and maintain the retail price of its food processors in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. *United States* v. *Cuisinarts, Inc.*, Cr. No. H80-49 (D. Conn.). On the same day, the United States filed a civil complaint seeking injunctive relief that essentially tracked the criminal indictment. *United States* v. *Cuisinarts, Inc.*, Civ. No. H80-559 (D. Conn.). Both cases were effectively settled on December 19, 1980, when the district court accepted an agreement worked out between the parties. In the criminal action Cuisinarts pleaded *nolo contendere* and was fined $250,000. In the civil action the parties submitted a stipulated final judgment that, after appropriate public notice, was entered as a final judgment by the court on March 27, 1981. Thus, all proceedings in the criminal and civil cases begun by the United States have been completed.

After Cuisinarts was indicted, a number of antitrust damage cases were brought against it and other defendants. Thirteen of those suits, including *parens patriae* actions by the Commonwealth of Massachusetts and the State of New Jersey, have been consolidated for pretrial proceedings in the district of Connecticut, which also retains authority over the grand jury material. In early 1981, Massachusetts and New Jersey, joined by thirteen states that are contemplating actions of their own, moved the district court under Section 4F(b) of the Clayton Act, 15 U.S.C. 15f(b), and Rule 6(e), Fed. R. Crim. P., for disclosure of grand jury materials in the possession of the Antitrust Division. The United States generally supported the states' request.

The district court denied the request in an opinion issued on June 8, 1981 (Pet. App. D1-D75). Although it assumed that grand jury materials in the possession of the Attorney General are part of his "investigative files" within the meaning of Section 4F(b) (Pet. App. D33), the district court held that the language and legislative history of Section 4F(b) foreclose any argument that Congress meant to alter existing standards for disclosing grand jury materials (Pet. App. D31, D40-D42). The court therefore applied traditional Rule 6(e), Fed. R. Crim. P., standards to the states' requests and found that the states had not made a particularized showing of need for the grand jury material (Pet. App. D45-D53).

The court of appeals unanimously affirmed the district court's decision for much the same reasons given by the district court (Pet. App. A1-A55).* In so doing it expressly

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* Unlike the district court, however, the court of appeals stated that grand jury records have traditionally been considered to be records of the judicial branch. The court thus rejected the argument "that Congress * * * intended general terminology such as 'investigative files or other materials' to embrace grand jury materials" (Pet. App. A26).

stated its agreement with the decision in *In re State of Illinois*, 659 F. 2d 800 (7th Cir. 1981), petition for cert. pending, No. 81-1114, and its disagreement with the decisions in *United States* v. *Colonial Chevrolet Corp.*, 629 F. 2d 943 (4th Cir. 1980), cert. denied, 450 U.S. 913 (1981), and *United States* v. *B.F. Goodrich Co.*, 619 F. 2d 798 (9th Cir. 1980) (Pet. App. A39).

2. The court of appeals' decision further sharpens a conflict among the circuits on the important question whether Section 4F(b) of the Hart-Scott-Rodino Act eases the burden on states seeking grand jury material under Rule 6(e), Fed. R. Crim. P. The Fourth and Ninth Circuits have held that states may obtain such material without the showing of compelling and particularized need traditionally required of private parties, though not on demand. *United States* v. *Colonial Chevrolet Corp., supra*; *United States* v. *B.F. Goodrich Co., supra*. The Seventh Circuit and now the Second Circuit have held that Congress did not intend that states be treated any differently in this regard from other antitrust plaintiffs. *In re State of Illinois, supra*.

The United States adheres to the view expressed earlier this Term that the Court should resolve this conflict in the circuits and should endorse the position of the Fourth and Ninth Circuits. See Brief For the United States in *Illinois* v. *Abbott & Associates, Inc.*, No. 81-1114. Since this case presents the same issue, we suggest that the Court hold this petition for disposition in light of the ultimate disposition of the *Illinois* case.

Respectfully submitted.

REX E. LEE
Solicitor General

MARCH 1982

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Respondent's Reply Brief

Supreme Court, U.S.
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Respondent.

REPLY BRIEF

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1595

STATE OF CONNECTICUT, *et al.*,

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v.

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

Petitioners acknowledge the support provided by the United States through its Memorandum filed by the Solicitor General urging the Court not to deny the writ of certiorari. Petitioners, however, oppose the suggestion of the United States "that the Court hold this petition for disposition in light of the ultimate disposition of the Illinois [*Illinois v. Abbott & Associates, Inc., cert. granted* 50 U.S.L.W. 3752 (U.S. 3/23/82) (No. 81-1114] case. *Memorandum for the United States at 3.*

The United States, in suggesting that this Court defer review of the matter at bar, has failed to consider the important underlying differences between the *Illinois* case and *Cuisinarts* which might affect their outcomes. The United States is correct when it notes that there is a common nucleus of operative general legal principles found in both

this case and in the *Illinois* case. *Memorandum for the United States at 3.* Conceding that most obvious proposition does not, as suggested by the United States, inexorably lead to the conclusion that only one or the other of these cases need be selected for plenary review by this Court.

Assume, for instance, that this Court concludes, contrary to the various courts of appeal, that the issue of Grand Jury release to state attorneys general cannot be resolved either through the application of established standards of Rule 6(e) or through automatic disclosure. Of necessity, the facts and circumstances surrounding particular applications for such disclosure will then become the bricks and mortar of the test this Court will establish. Given the enduring nature of this Court's decisions and the variety of attendant circumstances within which the issues herein have and will arise, this Court's resolution of the issues posed by the *Illinois* case, without having availed itself of the opportunity of reviewing other cases, such as this one, which could be joined without any substantial delay, might well result in the resolution of the basic issues posed without adequate consideration of other factors which might have varied the result.

Some of the questions which this court might find relevant to the disclosure issues posed by this case and the *Illinois* case are:

1. Whether the Grand Jury indicted and/or a noncriminal enforcement action was brought;

2. Whether the criminal or other proceedings, if concluded, produced any public record or alternative evidentiary benefit;

3. Whether the scope of underlying activity was of an extended and complex nature or relatively finite and limited;

4. Whether the state attorney general would likely proceed in a representative or proprietary capacity;

5. Whether continuing protection is necessary for particular witnesses either for their own protection or for the preservation of the integrity of related on-going investigations;

6. Whether Grand Jury witnesses were advised, prior to their testimony, of the possibility of disclosure; and

7. Whether substantial cost, delay or prejudice might result from the failure to grant disclosure.

Many of these factors, among others, would be more clearly demonstrated to this Court by the contemporaneous review of the instant case with the *Illinois* case.

In sum, resolution of the *Illinois* case may not be dispositive of *Cuisinarts*. We urge the Court to consolidate *Cuisinarts* with *Illinois* in order to best foster the principles of judicial economy and fairness to all parties whose rights might, as a practical matter, be determined without any meaningful opportunity to be heard.

CONCLUSION

For the reasons expressed above and in the petition for a writ of certiorari, the writ should be granted.

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